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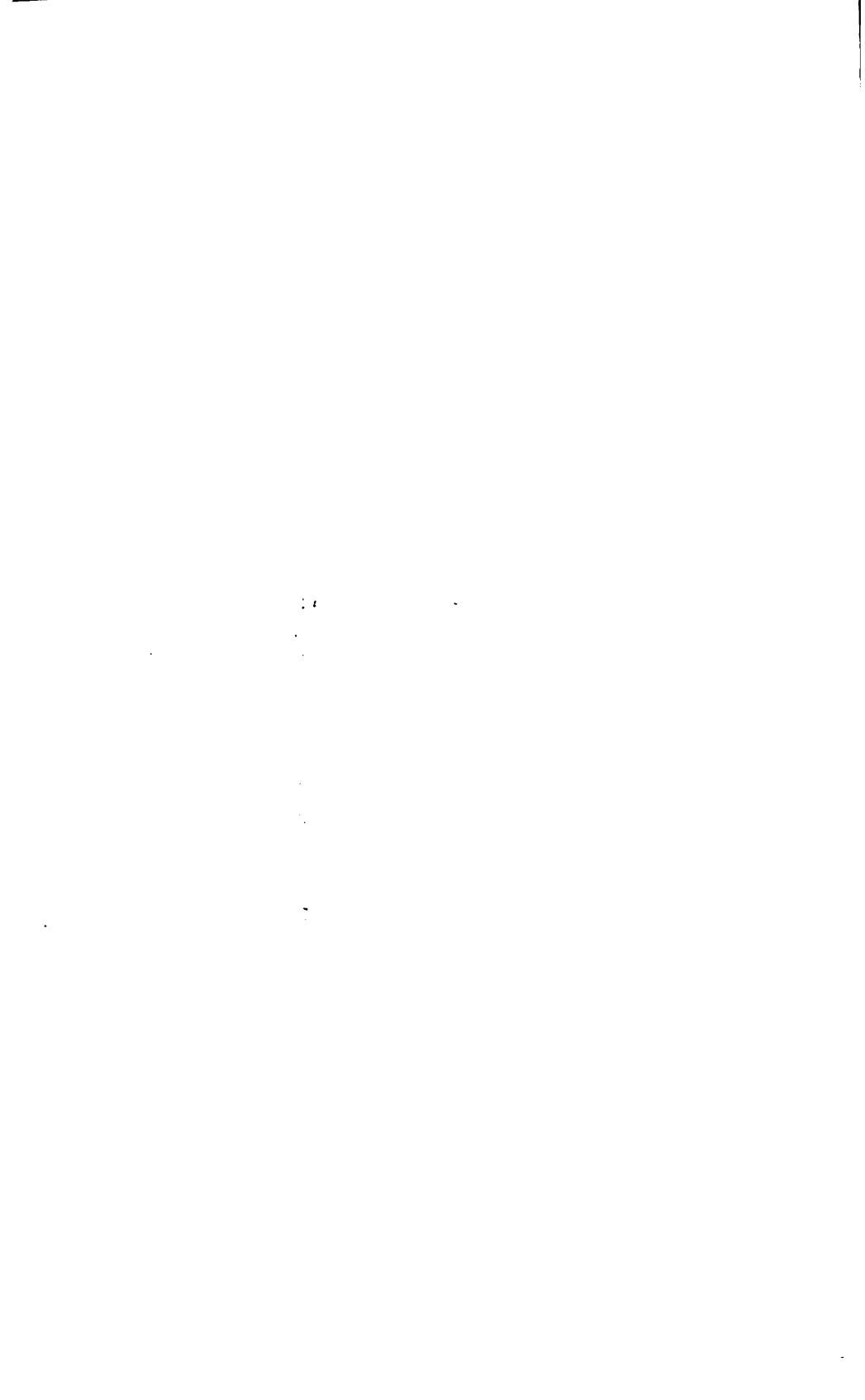
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REPORTS

OF

Cases in Law and Equity

DETERMINED IN THE

S U P R E M E C O U R T

OF THE

STATE OF NEW YORK.

BY OLIVER L. BARBOUR, LL. D.

VOL. LVIII.

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DURING THE YEAR 1871.

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CASES
IN
Law and Equity
IN THE
SUPREME COURT
OF THE
STATE OF NEW YORK.

D. COLDEN MURRAY and another *vs.* THE RECEIVERS OF
THE HARMONY FIRE AND MARINE INSURANCE COMPANY.

By the terms of a marine policy of insurance, the insurers were liable only for an absolute or total technical loss. The policy contained the following warranty: "Warranted by the assured free from loss or claims on account of capture, seizure, detention, or destruction by or arising from any belligerent nation, or from any seceding or revolutionary state or states of the union, or from any guerrilla party, or by or from any officer, civil or military, or other persons claiming to act in their name or under their authority, or in their behalf." The perils insured against were those of the "seas, winds, waves, rocks, sands, shoals and coasts, collisions and sinking at sea, fires, jettisons, loss by pirates, rovers or assailing thieves, barratry of the master and marines, and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said vessel, or any part thereof, occasioned by sea perils." *Held*, 1. That the forcible taking possession of the vessel by the officers of the United States government, with the intent to appropriate it to the use of the government for a specific purpose, viz., the carrying of a cargo to Santiago, amounted to a *capture*; and that the warranty in the policy did not extend to such capture.

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2. That the grammatical structure of the sentence containing the warranty precluded any such extension, and no reason was apparent why the construction of the clause should not be according to that structure.

And the vessel having been lost while thus in the service of the government, by stranding, and the insured having, without any previous abandonment, made a claim on the United States government for payment for the vessel, by reason of her loss while in the possession of the government officers, which claim was allowed and paid, to an amount nearly equal to the whole value of the vessel; *Held* that these circumstances caused the capture to cease from operating as a total loss; and that the insurers being liable, under the policy, only in case of a total loss, it was immaterial whether they had insured against capture, or not.

Held, also, that if the assured had desired to make the constructive total loss arising from the capture, an actual total loss, so far as the insurance was concerned, they should have abandoned; in which case the insurers would have been entitled to the sum paid by the government; but that they, not having done so, but choosing to hold on to their property in the vessel, and to accept the sum paid by the government, could not claim to recover of the insurers as for a total loss.

If the assured, before abandonment, either recovers the subject insured, or receives an indemnity for its loss, he cannot thereafter elect to abandon.

ON the 7th day of June, 1865, a policy of insurance was issued by the above insurance company upon the schooner Alice Dell. By its terms the company is liable only for an absolute or technical total loss. The policy contains the following warranty: "Warranted by the assured free from loss or claims on account of capture, seizure, detention, or destruction by or arising from any belligerent nation, or from any seceding or revolting state or states of the union, or from any guerrilla party, or by or from any officer, civil or military, or other persons claiming to act in their name or under their authority, or in their behalf."

The perils insured against were those of the "seas, winds, waves, rocks, sands, shoals and coasts, collisions and sinking at sea, fires, jettisons, loss by pirates, rovers or assailing thieves, barratry of the master and marines, and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said vessel, or any part thereof, occasioned by sea perils." The vessel sailed from New York for New Orleans, and arrived there in

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May, 1865. The master testifies that while discharging cargo there he received a written order from the quartermaster's department to come to the office; he went to the office. They told him they wanted his vessel to go to Santiago with a load of timber. He asked what would be the rate. They told him he should have what the Washington rates were; he did not know what the charges were, and did not ask. Stevedores, employed by the quartermaster's department, loaded the timber on board the vessel. The master, in his protest, says nothing about his agreement to carry the cargo, but terms the transaction a seizure of his vessel by the quartermaster at New Orleans, for the service of the United States government. In his evidence before the referee, he says that he agreed to take the cargo at the rates established at Washington. The vessel sailed on the 27th of May, 1865, with a load of lumber, for Santiago, where she arrived June 3, 1865. The master went ashore and reported to the quartermaster there, who told him to wait for further orders. On the 6th of June the cargo was discharged. On the 13th of June the quartermaster's tug came and towed the vessel outside the bar to lighten the brig Kodrick, but in consequence of the weather she was obliged to anchor astern of the brig. On the 14th of June the quartermaster's tug-boat came and towed the vessel alongside the steamer Illinois, and about 700 colored troops were transferred from the steamer to her, for the purpose of taking them in over the bar. The master, in his protest, says that owing to there being a heavy swell, he did not wish to take the vessel alongside the Illinois, as she would thereby be endangered, but the captain of the Illinois, with aid of United States officers, took the entire charge of the vessel, threatening to shoot him if he did not obey their orders. The master, in his evidence before the referee, says that he remained in command all the time until the vessel was lost, and that the captain of the Illinois tried to get command of the vessel, but did not succeed;

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but he further says, in his evidence, that the facts stated in his protest were made from his best recollection of the same as they had occurred ; that his recollection was better then than at this time before his evidence ; and that the facts in the protest are all true as far as his knowledge goes. He further states, in his evidence, as well as in his protest, that the captain of the Illinois threatened to shoot him unless he did as they wanted him to do. That they wanted him to lay alongside the Illinois to take troops from her ; that he did take troops from her, but had his own way about it. It appears from the protest and the captain's evidence, that after the colored troops, with their officers and a superior officer, had been taken on the vessel, she having a pilot on board, proceeded to cross the bar and enter the harbor of Brazos Santiago ; while doing so she struck on the bar ; the anchor was let go, and the captain remarked to the mate, "she is all right and can be saved at daylight." Thereafter one of the United States army officers gave orders to pay out ten fathoms of chain ; the captain objected ; the officer told him that unless he obeyed orders they would tie him and throw him overboard. The chain was payed out and the vessel commenced thumping in the beach breakers ; at about ten the next morning the vessel commenced leaking so badly that she could not be kept free by the pumps ; at eleven she was half full of water. The flood tide setting in strongly, the vessel commenced dragging her anchor towards the outer breakers ; at this juncture the United States officers and pilot left. During this time the master was not permitted to give any orders, or have any control over the vessel. It then appears from the protest, that the pilot and United States officers having left, the master perceiving that the vessel was being carried by the current directly upon the outer breakers, where there was danger that the vessel and all on board would be lost, set the mainsail and all the jibs, slipped the chain, and for general safety ran

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the vessel upon the south east beach of Petrie island. Here the vessel was stripped of everything except the masts, standing rigging and starboard anchor and chain. The vessel was full of water and lying quiet, breakers running over her, and in this condition she was left by the master and crew, they being unable to remain longer on board, and in order to save themselves were obliged to swim ashore. The protest leaves the vessel thus lying. The master, in his evidence before the referee, swears "that the vessel was lost; she went down in the quick-sands;" but he gives no particulars; he does not state when she went down, nor whether she could be got off and saved, or not; nor whether the getting her off and repairing would have been at such an expense as to render it unadvisable to undertake it. There is no pretense that the vessel was under charter or contract, made either voluntarily or compulsorily, with the quartermaster's department, from the time she discharged her cargo at Brazos Santiago until she was stranded.

GEO. G. BARNARD, J. It is laid down by good authority on insurance law, that if there be a capture, and before the vessel is delivered from that peril she is afterwards lost by fire, accident or negligence of the captors, the whole loss is properly attributable to the capture. (*Magoun v. The New England Marine Insurance Company*, 1 Story, 157.) So also, Justice Kent says: "Suppose the policy against capture only, and the vessel was captured, and then shipwrecked while in the hands of the captors; the assured might maintain that his right to recover for total loss attached upon the capture, and that the subsequent casualty was one in which he had no concern." (*Schieffelin v. New York Insurance Company*, 9 John. 27.) The converse of the last proposition is equally true. Suppose the underwriters exempt from the risk of capture, and after capture the vessel, while in the hands of the captors, wrecked by

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one of the perils insured against in the policy, the subsequent casualty is one with which the assurers have no concern, and the assured cannot recover. (*McCargo v. New Orleans Insurance Company*, 10 Rob. La. 328.)

It is not intended to say that the above cited cases are direct decisions sustaining the above propositions, but merely that the learned judges, in their opinions, laid them down as sound law. When we look at the principle on which they are founded, no reason for dissenting from them can be found. A capture is a total loss, subject to be defeated by a recapture, or relinquishment, unless the assured, in case he is insured against capture, abandons before notice of the defeasance. Consequently, until such defeasance the vessel is a total loss to the assured. It being so, he has no concern with what happens to the vessel during the continuance of the capture, for it harms him not. Therefore, if he warrants free from capture, and the vessel is lost by capture, he cannot hold the assurers for a total loss on a peril assured against, happening during capture; for the vessel has not been lost to him by that peril, but by the capture. The question then is, are the acts of the United States officers and soldiers in this case fraught with the consequences of a capture? If they are, then the stranding of the vessel is of no consequence in determining the defendants' liability. It is laid down that by capture is meant the taking possession of property by the commissioned officers and agents of some lawful and acknowledged government, with the purpose of appropriating it to the captor's own use. (*Phillips on Insurance*, §§ 1108-1110.) It is evident that in this case the vessel was forcibly taken possession of by the officers of a lawful government, with the purpose of appropriating it to the use of the government. It may be urged that the intent of appropriation, in order to constitute a capture, must be to divest the owner of the property for all time to come; and that an intent to appropriate it only for a specific purpose, or for

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a time only, and then to return, with or without an indemnity for the appropriating, constitutes not a capture, but a mere detention. I do not understand that the distinction between capture and detention rests on any such difference of intention. A detention arises when there is no intention to appropriate, and in fact no appropriation to the detainer's use, but where the property is either simply held as a hostage, as it were, for the payment of ransom, or for the purpose and as a means of obtaining some ulterior object, such as for the suspension of commerce with a port by embargo or blockade, which detains a vessel in that port, or for the exercise of the right of search. (1 *Story on Marine Insurance*, 584, 585.) The general definition that a capture means a taking with intent to keep, and an arrest or detention, a taking with intent to return the thing taken, must be regarded as not supporting any other doctrine; for the cases cited in support of this definition of an arrest or detention are all cases in which there was no design to appropriate the vessel to the detainer's use for any length of time, or for any specific purpose, but simply to detain it as a means of enforcing some other object had in view. And although there is no decision directly in point, that the forcible taking possession, by the officers of a recognized government, of a vessel, with the intent to appropriate it to the taker's use, for a specific purpose, or for a time only, amounts to a capture, yet its effect is substantially the same as a capture by the enemy, with intent to appropriate for all time to come. The owner is deprived of his property. True, it may possibly be returned to him; but then, just as possibly, it may not. The vessel may be worn out, or lost, while in the service of the takers; or if not, the government may never carry out its intent of restoration. As in the case of capture by the enemy, there is a possibility of restoration by a recapture or relinquishment, so in the case of a taking with the intent to appropriate for a time and then return, there is a possi-

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bility of restoration. The only difference between the cases is, as to the degree of the possibility. Where there is a total loss while the vessel is in the hands of the takers, and appropriated to their use, the possibility of a restoration is just as completely extinguished in the one case as in the other. I have, therefore, come to the conclusion that the seizure in the present case amounted to a capture; and as the stranding of the vessel took place before she was delivered from that peril, the assurers are not liable, unless they have insured against capture by the United States government or those acting under it; and not even then if, since the capture, circumstances have transpired which, in the event of no abandonment prior thereto, would defeat the operation of that capture as causing a total loss.

First. Have the assured warranted against the capture in question? I think not. It seems to me that the warranty does not extend to this capture. The grammatical structure of the sentence containing the warranty precludes any such extension, and no reason is apparent why the construction of the clause should not be according to that structure.

Second. Does the term "perils of the sea," cover capture? Two eminent writers on marine insurance differ in their views on this question. Thus, *Marshall* observes: "In a large sense, all the accidents or misfortunes to which those engaged in maritime adventure are exposed, may be said to arise from the perils of the sea; and, conformably to this idea, a loss by capture was formerly holden, in our courts, to be a loss by the perils of the sea, as much as if it were occasioned by shipwreck or tempest. But in more modern times it has been found convenient to distinguish the losses, to which ships and goods at sea are liable, by the more immediate causes to which they may be particularly ascribed. In this view, losses by the perils of the sea are now restricted to such accidents or misfortunes

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from mere sea damage, that is, such as arise, *ex vi divina*, from stress of weather, winds and waves, from lightning and tempests, rocks and sands," etc. (*Marshall on Marine Insurance*, 385, 386.) *Phillips*, on the other hand, says: "The risks or perils, or causes of loss, for which indemnity is promised, must be specified. These are usually perils of the seas, fire, public enemies, thieves, captures, restraints and detentions by governments or people, and barratry of the master and mariners, and all other perils. The first of these descriptions, namely, 'perils of the seas,' is the most comprehensive. It includes all the others, while the subject is off land, except the last, which has very little practical effect, since it can be applied only to perils of the like kind to those specifically enumerated." (*Phillips on Insurance*, § 35.) Again he says: "Perils of the seas, which constitute a part of the risks, in almost every marine policy, comprehend those of the winds, waves, lightning, rocks, shoals, collision, and in general, all causes of loss and damage to the property insured, arising from the elements, and inevitable accidents, though sometimes considered not to include capture and detention." (*Phillips on Insurance*, § 1099.) The question has never been solved by any decision directly on the point, nor is it necessary to solve it in this case, since I have come to the conclusion that circumstances have occurred since the capture which, there having been no abandonment before their occurrence, cause the capture to cease operating as a total loss. This being so, and the insurers being liable under the policy only in case of a total loss, it is immaterial, so far as their liability in this case is concerned, whether they have insured against capture or not. The circumstances alluded to are, the claim made by the assured on the United States, for payment for the vessel, by reason of her loss, while in the possession of the government officers, and the payment by the government and

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acceptance by the assured, upon that claim, of \$16,000 or \$17,000. being nearly the whole value of the vessel. In all cases of constructive total loss, including therein capture, there remain some valuable remnants, or a valuable hope and possibility of recovering the property, or indemnity for its loss or detention. If, then, an assured seeks to recover of the assurers, as for a total loss, it is a plain principle that he should place them in a position to realize from this remnant or receive the benefit from a recovery of the property or of the indemnity. (*Parsons on Marine Insurance*, 108, 499.) He is therefore bound to make his election whether he will give up this remnant, &c., to the assurers, and hold them as for a total loss, or will retain the remnant, &c., and hold the assurers for a partial loss only. His election to give up constitutes what is termed in insurance law an abandonment. It follows that if, before abandonment, he either recovers the subject insured, or receives an indemnity for its loss, he cannot thereafter elect to abandon. There are some exceptions to this general rule, in case of a recovery by recapture, as, for instance, where the salvage on a recapture exceeds half the value of the subject insured, or (where the insurance is on freight or goods) the voyage is broken up by the capture, in which cases he may abandon, although the subject insured has been recaptured. (2 *Phillips on Insurance*, §§ 1530, 1531, 1621. *Marshall on Insurance*, 454.) In the present case the assured have already received, for the loss of the subject insured, almost its whole value. If they had desired to make the constructive total loss arising from the capture an actual total loss, so far as the insurance is concerned, they should have abandoned; in which case the assurers would have been entitled to the sum which they (the assured) have already received. This they did not do. On the contrary, they deemed it more to their advantage (as the evidence in the case shows it in fact was,) not to abandon, and received the amount of the insurance as for a total

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loss, but to hold on to their property in the vessel, and their hope and expectation of procuring from the United States an indemnification in a greater amount than they expected to realize from the sum insured. They did so. Their expectations have been realized. They cannot now say to the assurers, although we have received for the loss of our vessel nearly her whole value, yet you must pay us as for a total loss.

The order confirming the referee's report must be reversed, referee's report set aside, and the order of reference vacated.

INGRAHAM, P. J. By the policy the insured warranted against any loss from capture, seizure or detention, or any of the consequences of the hostilities of nations. The evidence shows such seizure by a vessel of the United States, and control taken by the captain of the United States vessel, by which the vessel insured was taken from the charge of the captain in command at the time, and which proceeding occasioned the loss.

We think this comes within the exception in the policy, and the assurers are not liable. (*Swinerton v. Columbian Insurance Co.*, 37 N. Y. 174.)

The referee also erred in not allowing interest on note.

The report should be set aside, and order of reference vacated.

BRADY, J., concurred.

[NEW YORK GENERAL TERM, JANUARY, 8, 1870. *Ingraham, Geo. G. Barnard and Brady, Justices.*]

POLLITT and ANDREWS vs. LONG.

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The owner of land through which a stream of water naturally flows has the right to use the water, there, in any manner he may see fit, so that he does not interfere with the rights of other owners to the use of the water, on the stream below, or above.

This right to use the water is incident to the ownership of the land through which the stream naturally flows, and pertains alike to every owner of the soil.

And even if an owner has had the uninterrupted flow and use of a stream on his own land, for twenty years or more, he does not thereby acquire such a prescriptive right to such uninterrupted flow and use that he can prevent an owner of land on the stream above from using and enjoying the water upon his land in any reasonable and proper manner.

Yet an owner above may acquire a right, by prescription, to detain and obstruct the flow of water, to an accustomed extent, and for a fixed period, against the owners below. *Per* JOHNSON, J.

The right to water flowing through land is the right of use, only; and this is a right belonging to each owner, in common with every other owner of the land through which the stream naturally flows. No one owner can divert it from the land of another, or obstruct and detain it to the injury of another, without rendering himself liable in an action to recover damages, or to obtain such other relief, or remedy, as the particular case may call for.

All that the law requires of the party, by or over whose land a stream passes, is that he shall use the water in a reasonable manner, and so as not to destroy, or render useless, or materially diminish, or affect, the application of the water, by the proprietors below, on the stream. He must not shut the gates of his dams and detain the water unreasonably, or let it off in unusual quantities, to the annoyance of his neighbor.

Where the defendant, the owner of a mill situated above the factory of the plaintiffs, upon the same stream, had been in the habit of keeping his gates closed through several of the working hours of each day, and for that time depriving the plaintiffs wholly of the use of the water for their factory, and then letting it off in such unusual quantity that the plaintiffs could only use a small portion of it while passing, when, without such detention, they would have been able to run their factory constantly and without interruption; *Held* that this conduct of the defendant was clearly unjustifiable, and gave the plaintiffs a good right of action, at least to recover damages for the injury occasioned by the detention.

Held, also, that this was a proper case for the preventive remedy by perpetual injunction.

Since the Code, it is unnecessary, as a preliminary to that species of relief, to settle the right by any action at law, even where the right is doubtful.

The true measure of damages, in such a case, is the value of the use of the

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water to the plaintiffs, situated as they were, during the time they were wrongfully deprived of it.

Where, in such an action, the plaintiffs were allowed to prove, how many yards less of cloth they made, in consequence of the detention of the water by the defendant, than they could have made, had the water not been detained as it was, and what the profit on each yard manufactured and sold was, at the price at which they sold what they did make; *Held* that this was clearly incompetent for the purpose of ascertaining the amount of damages sustained by the plaintiffs; it being wholly speculative and conjectural.

APPEAL, by the defendant, from a judgment entered upon the report of a referee.

The action was brought to recover damages for the obstruction of a certain water course, in the town of Sardinia and county of Erie, upon which a factory, owned and operated by the plaintiffs, and a saw-mill, owned by the defendant, were located, and to obtain an injunction restraining the defendant from further obstructing the water of said stream. The defendant's mill is situate about one hundred and twelve rods above the factory of the plaintiffs, and the obstructions complained of consisted in the entire stoppage of the water by the defendant at his mill, at times, so that the plaintiffs were wholly deprived of the use thereof. The plaintiffs, in their complaint, claimed the right by prescription, to the uninterrupted use and enjoyment of the water of said stream for the purpose of propelling their factory, and further alleged that the use of the same by the defendant, as therein set forth, was unreasonable and unnecessary. The obstruction and stoppage complained of began on the 15th day of October, 1866, and this action was commenced about the 1st day of November, 1866.

The defendant, by his answer, denied all the material allegations of the complaint, except the ownership of the factory, and claimed a right to run and operate his mill, by prescription.

On the 18th day of December, 1867, the referee made his report, by which he found the facts, very minutely and

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at great length. The 27th and 28th findings of fact were as follows:

That during the time in October, 1866, when the plaintiffs' said factory was stopped and detained for an aggregate period of four days, as aforesaid, by the use of the water in said stream by the defendant for his said saw-mill, the said factory was of no use or profit to the plaintiffs. That during said time the plaintiffs could and would have manufactured, in said factory, four hundred yards of woolen cloths, but for such stoppages and detentions, which by such stoppages and detentions they were wholly prevented from doing; and that upon said cloths the plaintiffs would have realized and received, for the manufacture thereof, twenty cents upon each yard thereof. That by said stoppages and detentions in the running and operating of the said factory as aforesaid, the plaintiffs had sustained damages to the amount of \$80.

The referee found, as conclusions of law: 1st. That on the 15th day of October, 1866, and at all times between that day and the 26th day of the same month, the plaintiffs were and are entitled to have the water flow in said stream through and along the plaintiffs' premises to the factory, in the same manner and in the same quantities as it had been accustomed to flow therein prior to, and up to said 15th day of October, 1866; and that the stopping and detaining of said water by the defendant, on and after the 15th day of October, in the manner aforesaid, was a violation and infringement of the right of the plaintiffs.

2d. That the defendant should be perpetually enjoined and restrained from so using the water in said stream as to interrupt or interfere with the use thereof by the plaintiffs for their said factory, in the manner in which they had been accustomed to use the same prior and up to the said 15th day of October, 1866, and from preventing or interrupting the flow of the water in said stream through and along the plaintiffs' said premises, as it had

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been accustomed to flow therein prior and up to the 15th day of October, 1866.

3d. That the defendant pay to the plaintiffs the amount of the damages sustained by them as aforesaid.

4th. That the plaintiffs recover the costs of this action.

And he directed that judgment be entered in favor of the plaintiffs for the recovery of the said damages, together with the costs of this action, and perpetually enjoining and restraining the defendant as aforesaid.

H. C. Day, for the appellant

I. The referee, upon his finding of fact, "That for more than twenty years immediately preceding the 15th day of October, 1866, the plaintiffs and their grantors, the owners of said factory, have had the uninterrupted use and enjoyment under a claim of right to such use and enjoyment of so much of the water flowing," &c., predicates his first finding of law. Warren B. Andrews purchased the saw-mill now owned by the defendant, about November 1st, 1844. At that time no question had arisen between the factory and the mill about the use of the water. About May or June, 1845, a dispute arose between W. B. Andrews, who is the brother of the plaintiffs, and who then owned the saw-mill, and the owners of the factory. Then, he swears, he used the water, subject to the orders of proprietors of the factory, for the time being, while he was there. Andrews sold it to O. J. Green, Nov. 24, 1863. It appears that during the greater part of the time, while Andrews owned it, he leased it to others, who ran it regardless of the factory, shutting down the gates in the daytime, and dusting them down and operating it whenever it was to their advantage to do so. Green owned the saw-mill from November 24th, 1863, to September 8th, 1864. He ran it with an eye looking solely to his own interest. If the factory people complained, he gave them water when he could, conveniently. The defendant purchased the saw-

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mill of Green, and ran it ever since, as Mr. Green had done. The flume and gates of the saw-mill were out of repair during Mr. Green's ownership, and also during the defendant's ownership of the mill, down to the repairs of October 15th, 1866. The referee finds that the water flowed for 20 years prior to October, 1866, to the plaintiff's factory, *under a claim of right*. That the flume and gates of the defendant's mill leaked water into his race, under the same claim of right. When Andrews' tenants ran the saw-mill, and during the time Green ran it, so far as the factory owners were concerned, they mutually accommodated each other. The language of Bronson, J., in *Parker v. Foote*, (19 *Wehd.* 313,) though often referred to and quoted, has never been qualified or questioned, regarding title by prescription, or the presumption of a grant. He says: "The enjoyment of the easement must not only be uninterrupted for the period of twenty years, but it must be adverse, not by leave or favor, but under a claim or assertion of right, and it must be with the knowledge and acquiescence of the owner." (*Flora v. Carbean*, 38 *N. Y.* 111.) If the defendant had never availed himself of the use of his mill-site while the plaintiffs had run and operated their factory with the full natural flow of the stream, still the plaintiffs would not have acquired, by such use, any superior rights in the stream, over the defendant, or abridged his natural right to the enjoyment of his water privilege whenever he sought to make use of it. There can be no prescription where there is no adverse user, and there can be no adverse user without creating a right of action. (*The Trustees &c. of Delhi v. Youmans*, 50 *Barb.* 316.) The false impression which the referee has as to prescriptive right acquired by the owners of the factory through their use of the water in running and operating their factory, enters into and shapes most of his findings. The finding at fol. 429 is predicated upon "the

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manner in which the water flowing in said stream had been used by the proprietors of the factory," &c.

II. The finding of the referee, "that the present arrangement for propelling the factory by means of water in the stream, is the best practicable arrangement, with reference to economy in the use of water, that could be made," is wholly unwarranted by the proof, and in conflict with the referee's finding, that "the surplus, over and above what was necessary to run the factory, was wasted and wholly lost." The referee finds that the dam was and is constructed and used, not for the purpose of accumulating a supply of water. Loveland swears that the water would run out of the race in 15 or 20 minutes. The plaintiff Pollitt swears, "if defendant's gate is shut, our dam will operate our factory about half an hour." The plaintiffs' dam is constructed within a rod of the defendant's line; so that if the factory dam was raised very much it would set the water back upon the defendant's saw-mill. Yet the dam, placed as it is, might be raised eight inches or a foot, and double the capacity of the plaintiffs' pond, without interfering with the operation of the saw-mill. If the plaintiffs would clear out their race, the water in their pond would run the factory twice as long. The plaintiffs' attention has been repeatedly called to this. The plaintiffs abandon a dam, near their factory, giving them a pond equal to that of the defendant, which gave them water in greater abundance and more constantly than their race, and constructed a new dam within a rod of the defendant's premises. The factory pond of the plaintiffs was of about equal capacity with the saw-mill pond. The water there was more constant and abundant. If the plaintiffs had a dam properly constructed for their factory, the running of the saw-mill would not injuriously affect the running of the factory. Mr. Rider, a partner in the factory, talked of building a dam four or five rods below their present dam, to remedy the difficulty. The plaintiffs

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use an artificial raceway, where the water is constantly absorbed, and let a stream pass their factory, in the original channel, as large as that of the raceway. All the other mills and factories on the stream run and operate with dams like the defendant's, and yet the referee finds "that the present arrangement for propelling the factory by means of water in the stream is the best." In this connection we may also turn to the finding of the referee: "When the gates of the saw-mill would be hoisted, the water would flow into and through the channel of the stream below, four or five times greater than could be used by the factory, and the surplus over and above what was necessary to run the factory was wasted and wholly lost." The same question was considered and disposed of, but not in the same manner, by Chief Justice Shaw, in *Gould v. Boston Duck Co.*, (13 Gray, 442-453.) He there says: "One of the grounds of plaintiff's complaint was, that when the water was very low, in times of drought, and the defendants detained it a few hours, or in one instance a whole day, to raise the water to a sufficient height to work their own factory, it came to the plaintiff's mill faster than he could use it, and ran to waste over his dam. If it was so, it was because he had works not adapted to the entire or best use of the stream; because his dam was too low, his reservoir not of sufficient capacity, or other cause, by which he was prevented from making the best use of the power of the water, when very low by reason of drought. If there was a loss of water at such times and from such cause, it was not one for which the defendants were responsible."

III. The findings of fact by the referee, at fols. 407, 408, 409, 431, 432, are contrary to the evidence.

IV. All the accredited text writers on this subject agree that an owner above has a right to the reasonable use of the water for mill or other purposes, whatever may be the effect upon the owners below, and he is not liable

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for obstructing and using the water for his mill, if his dam is only of such magnitude as is adapted to the size and capacity of the stream, and to the quantity of water usually flowing therein, and his mode of using the water is not unusual or unreasonable, according to the general custom of the country, in such cases, of dams upon similar streams. (*Thurber v. Martin*, 2 Gray, 394. *Wash. on Easements*, 253. *Pitts v. Lancaster Mills*, 13 Metc. 156. *Angell on Water Courses*, p. 117, §§ 116, 117.)

Grover Cleveland, for the respondents.

I. The evidence as to the reduced amount of the cloth manufactured by the plaintiffs, during the interruptions of the water by the defendant, and as to the average profit per yard of cloth manufactured by them, was properly received. It had already appeared, by the testimony of the witness, that at the time the interruption commenced, the plaintiffs had demand for all the cloths, and more than they made, and that they were making \$2500 or \$3000 worth, a month; and that for four days out of the ten immediately preceding the commencement of the action and the service of the injunction, their factory had stood idle, by reason of the stoppage of the water by the defendant. The inquiry as to how much less cloth they manufactured during the continuance of the interruptions by the defendant, tended to show the character and extent of such interruptions, and that they were sufficient to call for the interference of the court. This proof, taken in connection with the evidence as to the average profits realized by the plaintiffs, upon the cloth manufactured by them, was also proper upon the question of damages. A part of the relief demanded in this action is the recovery of damages for the wrongful act of the defendant, in interrupting the operations of the plaintiffs' factory for a period equal to four days out of ten. In such cases, the loss of profits to which a party has been subjected, as a legitimate result of

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the trespass, if they can be shown with reasonable certainty, constitute a safe measure of damages. (*Sedgwick on Damages*, p. 80; 5th ed. p. 86, note 2. *White v. Moseley*, 8 Pick. 356. *St. John v. Mayor &c. of New York*, 6 Duer, 315. *Price v. Murray*, 10 Bosw. 243.) The profits the plaintiffs would have certainly realized from the manufacture of cloths, but for the interruptions caused by the wrongful act of the defendant, represented the value of the use of their property, of which they had been deprived; and this has always been allowed in the estimation of damages. (2 *Greenl. Ev.* § 625.) If the court should be of the opinion that the principle upon which the damages were estimated is not the correct one under the circumstances, the judgment may be modified by remitting the damages. (*Story v. The N. Y. and Harlem Railroad Co.*, 2 Seld. 85. *The People v. The Supervisors of Richmond County*, 28 N. Y. 112. *Brownell v. Winne*, 29 id. 400.)

II. The plaintiffs were entitled, by prescriptive right, on the 15th day of October, 1866, to the use and enjoyment of so much of the water flowing in the stream as was necessary to keep the factory constantly in operation. The parties to this suit, simply as riparian owners, had each the right to the use of the water in the stream, in a reasonable manner; and the defendant originally had the right to apply the water to work his mill, subject, however, to this limitation, that if in the exercise of this right, and in consequence of it, the plaintiffs' factory was rendered useless and unproductive, the law would interfere and limit this common right, so that the plaintiffs should enjoy a fair participation. (*Merritt v. Brinkerhoff*, 17 John. 306.) This was the condition of affairs, and these were the rights of the parties, in the year 1842, when the factory was built, and in 1843, when the saw-mill was erected. The claim of the plaintiffs is, that by an uninterrupted use of the water of the stream in a certain manner for more than twenty years, that is, by the use of it for the purpose of

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propelling their factory, to the exclusion of the defendant's riparian rights, they have acquired the rights to sufficient flow of water to run their factory at all times when the stream is sufficient, without any interruption from the defendant, for the purposes of his mill. "If one proprietor has, during a period of twenty years or more, possessed and used the hydraulic property belonging to another, not by license or favor, but adversely and in derogation of the rights of such other proprietor, the law, upon considerations of policy and for the purpose of quieting a long possession, will presume a grant from the proprietor thus intruded upon, to the other, and will preclude the party who has thus acquiesced from asserting the right which he otherwise would have had." (*Townsend v. McDonald*, 2 Kern. 381, 391, and cases cited. *Baldwin v. Calkins*, 10 Wend. 167. *Belknap v. Trimble*, 3 Paige, 577.) This case was much like the case at bar, and fully sustains the position of the plaintiffs. (*Angell on Water Courses*, § 205. *Tyler v. Wilkinson*, 4 Mason, 397. *Miller v. Garlock*, 8 Barb. 153. *Brace v. Yale*, 10 Allen, 441.) In order to establish the plaintiffs' claim by prescription, his enjoyment of the water of the stream must be "continued uninterrupted and adverse—that is, under a claim of right, with the acquiescence and knowledge of the owner." (*Colvin v. Burnet*, 17 Wend. 564.) The referee has found, "that said factory was propelled and operated by means of said race-way and overshot wheel in 1842, and that ever since that year it has been, and still is, propelled and operated by means of the water flowing through this race upon said overshot wheel." And he further finds, "that for more than twenty years immediately preceding the 15th day of October, 1866, the plaintiffs and their grantors, the owners of the said factory, have had the uninterrupted use and enjoyment, under a claim of right to such use and enjoyment, of so much of the water flowing in the said stream as was necessary to keep the said factory constantly in

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operation and running, whenever the quantity of water flowing in the natural channel of said stream above, through and along the said plaintiffs' premises, was sufficient for that purpose, and free from any interruptions in such use and enjoyment caused by the running and operating of said saw-mill." This amounts to a finding, that the plaintiffs have for more than twenty years, uninterruptedly used the water of the stream in a particular way—that is, for the purpose of at all times running their factory, to the exclusion of the defendant's riparian rights, and that such use has been adverse and in derogation of the rights of the defendant. If this finding of fact is sustained by the evidence, (as we claim it was,) the prescriptive right of the plaintiffs is complete. All the persons who were sworn, connected with the factory, or who had worked there, testified to the running of the factory without interruption from stopping of the water, up to the time the detentions by the defendant occurred. Here we have, then, this factory, first run in 1842, and without any interruption by detention of water, till about the spring or summer of 1845; then precisely such acts on the part of the mill owners as are now charged against the defendant; these were promptly complained of, and the right now claimed by the plaintiffs asserted, and recognized by the mill owners, and from that time up to October 15, 1866, the proprietors of the factory have continuously enjoyed the right to the use of the water as then claimed, in derogation and limitation of the riparian rights of the mill owners. Any interruptions that defeat the right by prescription must be interruptions of the right itself, and not of the mere user. (*Angell on Water Courses*, §§ 211, 212.) It is sufficient if for twenty years prior to October 15, 1866, the factory proprietors exercised the right claimed whenever they chose or found it necessary to do so. There is no testimony in the case showing that the right of the plaintiffs to have the water of the stream for the purpose of running the

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factory, had ever been interrupted, and what the witnesses for the defense say in relation to the running of the mill, only shows that at certain times the water was sufficient for the mill and factory both.

III. The use of the water by the defendant after the 15th of October, 1866, was unreasonable, and an infringement of the plaintiffs' riparian rights. The referee has found "that the use of the water in said stream for said saw-mill, by the defendant, between the 15th and 26th days of October, 1866, in the manner described, was not a reasonable use thereof." The case of *Merritt v. Brinkerhoff*, (17 John. 306,) was very much like the case under consideration, so far as the claim that the defendant unreasonably used the water is concerned, and the jury having found against the defendant there, as the referee has in this case, the court refused to disturb the verdict. The interruptions in that case consisted of the defendants detaining the water in their dam for an hour or more at a time, and afterwards letting it out in such torrents that it would be wasted; and it was further proved that by such use of the water by the defendant, the mills of the plaintiffs were stopped from half an hour to two hours daily. And from a statement in the opinion of the court, we learn that the works of the defendant required double the quantity of water used by the plaintiffs' mills. There was no pretense that the detentions were wanton, or that the water was detained for any purpose except to run the defendant's works to the utmost advantage, without any reference to the rights of the plaintiffs in the stream. The referee has found the extent and cause of the stoppages complained of, that the water was wasted, and a detailed manner of how the mill was run at the time the interruptions occurred. These findings are: 1st. That on the 15th day of October, and on divers other days between that day and October 26th, by the shutting down of the defendant's gates in the day time, the water was stopped and detained from the plain-

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tiffs' factory, and work therein was entirely suspended from one to three hours, etc. 2d. That when the gates were hoisted the water would flow in the stream below, in quantities four or five times greater than could be used in the factory, and the surplus was wasted and lost. He further finds, that all through the month of October, 1866, the quantity of water flowing in the natural channel of the stream was sufficient to propel the machinery of the factory, but not to operate the saw-mill; and he finds that it requires much less water to propel the factory than the saw-mill wheel. The facts above stated, as found by the referee, if the evidence warrants them, makes this case, so far as the same proceeds upon the doctrine of reasonable use, on all points analogous to the case of *Merritt v. Brinkerhoff*. The plaintiffs further claim that the use of the water in the manner complained of was unnecessary. The witness Hobart ran the mill after the repairs were made, and after the service of the injunction without, as far as appears, interrupting the factory. About the time he was building his new flume, the defendant declared to the witness Ellis, that he was going to try to build a flume so tight that the factory fellows could not run the factory by the water that leaked through.

By the Court, JOHNSON, J. The cause seems to have been tried before the referee as though the rights of the plaintiffs, to some extent, depended upon prescription by user. We do not see, from the evidence, that any such question arises on the plaintiffs' part, in the action. Their factory, as we understand the case, is upon their own land, through which the stream of water in question naturally flows. This gives them the right to use the water there in any manner they may see fit, so that they do not interfere with the rights of other owners to the use of the water, on the stream below, or above. This right to use the water is incident to the ownership of the land through

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which the stream naturally flows, and pertains alike to every owner of the soil. And even if an owner has had the uninterrupted flow and use of a stream on his own land for twenty years or more, he does not thereby acquire such a prescriptive right to such uninterrupted flow and use that he can prevent an owner of land on the stream above from using and enjoying the water upon his land in any reasonable and proper manner. An owner above may acquire a right by prescription, to detain and obstruct the flow of water, to an accustomed extent, and for a fixed period, against the owners below; but the defendant does not show any such right against the plaintiffs, and no such question, we think, properly belongs to the case. The main question, upon the merits, appears to be whether the defendant, in the exercise of his right to use the water upon his own lands, has been guilty of doing it in such a manner as to violate the rights of the plaintiffs, and deprive them of the lawful use of the same water, in whole or in part, for their factory below. The right to water flowing through land, is the right of use only; and this is a right belonging to each owner, in common with every other owner of the land through which the stream naturally flows. No one owner can divert it from the land of another, or obstruct and detain it to the injury of such other, without rendering himself liable in an action to recover damages, or to obtain such other relief or remedy as the particular case may call for. *Kent*, in his *Commentaries*, says: "All that the law requires of the party, by or over whose land a stream passes, is that he should use the water in a reasonable manner, and so as not to destroy, or render useless, or materially diminish, or affect, the application of the water, by the proprietors below on the stream. He must not shut the gates of his dams and detain the water unreasonably, or let it off in unusual quantities, to the annoyance of his neighbor." (3 *Kent's Com.* 440. See

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also *Merritt v. Brinkerhoff*, 17 John. 306.) This is undoubtedly the true rule; and the rule of the civil law is, in this respect, substantially the same. Upon the facts found by the referee, the detention of the water by the defendant has been clearly unreasonable and unlawful, as against the plaintiffs. He had been in the habit of keeping his gates closed through several of the working hours of each day, and for that time depriving the plaintiffs wholly of the use of the water for their factory, and then letting it off in such unusual quantity that the plaintiffs could only use a small portion of it while passing, when, without such detention, they would have been able to run their factory constantly, and without interruption. This was clearly unjustifiable, and gave the plaintiffs a good right of action, at least to recover damages occasioned by the detention. It is said, in behalf of the defendant, that he has a right to the beneficial use of the water upon his own land, and that he cannot use it with any advantage or profit to himself, without detaining it as he has heretofore done, and in the manner complained of. But the plain answer to this is, that if this manner of using is substantially prejudicial to the rights of others, and sensibly diminishes the value of their rights to the common use, he must forego the use of it in that manner, and use it in some other way, though such other way may be less profitable. The true test is, whether the use complained of is really and sensibly injurious to the common rights of other proprietors. (*Tyler v. Wilkinson*, 4 Mason, 401. *Angell on Water Courses*, §§ 115-118.)

There can be no doubt, we think, upon the evidence and the facts found by the referee, that this is a proper case for the preventive remedy by perpetual injunction. This has been the rule in cases of this description, certainly ever since the case of *Robinson v. Lord Byron*, (1 Bro. C. R. 588; 2 Story's Eq. § 927; *Angell on Water Courses*, § 445; *Gardner v. Village of Newburgh*, 2 John. Ch. 162; *Corning*

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v. *The Troy Iron and Nail Factory*, 40 N. Y. 191.) Many other decisions might be cited in our own courts in this State, to the same effect. The last case cited holds that since the Code it is unnecessary, as a preliminary to this species of relief, to settle the right by an action at law, even where the right is doubtful. The only difficulty in affording the remedy in a case of this kind is, in fixing the limit of the detention by the defendant in future, by decree. In this respect, however, I do not see but the referee has fixed it with as much exactness and particularity as the case admits of. The judgment ordered allows the defendant to use and detain the water for his own use, as it was used and detained, by the owners of the same premises, prior to the 15th of October, 1866. Of this the plaintiffs do not complain; and I think we should not disturb the judgment on this ground.

The reversal is placed solely upon the ground of the admission of improper evidence on the question of damages. The plaintiffs were allowed to prove, against the defendant's objection, how many yards less of cloth they made in consequence of the detention of the water, than they could have made had the water not been detained as it was; and what the profit on each yard manufactured and sold was, at the price at which they sold what they did make. This was clearly incompetent for the purpose of ascertaining the amount of damages sustained by the plaintiffs. It was wholly speculative and conjectural. It was mere matter of opinion whether the additional amount could or would have been manufactured had the water not been obstructed, and, if such additional quantity could or would certainly have been manufactured, whether it would or could have been sold at the same price. Speculative profits are not recoverable in an action for damages. (*Griffin v. Colver*, 16 N. Y. 489.) The true measure of damages in a case like this, is the value of the use of the

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water to the plaintiffs, situated as they were, during the time they were wrongfully deprived of it.

The judgment, for this error, must be reversed, and a new trial ordered, with costs to abide the event.

New trial granted.

TALCOTT, J., did not sit in the case, having been, previously to his election, consulted as counsel.

[FOURTH DEPARTMENT GENERAL TERM, at Buffalo, June 6, 1870. *Mullin* P. J., and *Johnson*, Justice.] ✓

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RINDSKOPF *vs.* THE FARMERS' LOAN AND TRUST COMPANY.

The general covenant, to warrant and defend premises conveyed, against all lawful claims, includes the covenant for quiet enjoyment; and the true meaning of it is that the grantee and his heirs and assigns shall not be deprived of possession by force of a paramount title. It runs with the land, and passes with the fee to any subsequent grantee of the same title.

Such a covenant, it is well settled in this State, is only broken by actual eviction from the premises. Where there has never been any possession under or through the deed containing the covenant, there can be no actual eviction.

Where, at the date of a deed, the premises granted are in the possession of other persons claiming adversely to the grantee and his grantor; and such persons, and others claiming under them, are permitted by the grantee and those deriving title from or through him, to remain undisturbed until their adverse possession ripens into a good title, as against the grantee, the latter, or one claiming under him, cannot be allowed to recover upon the covenant of warranty, for a failure of title by such means; they not having lost their land by a title paramount, existing at the time of executing the covenant, but by their own laches, in suffering an imperfect and inferior claim of title to become a legal title paramount to theirs.

APPEAL by the plaintiff from a judgment entered upon the report of a referee, dismissing the complaint, with costs. The action was brought to recover damages for breach of a covenant of warranty contained in a deed.

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The referee found the following facts: On the 7th day of May, in the year 1852, the defendant, a New York corporation, and successor to the Holland Land Company, by deed granted and conveyed to one Horace Frizelle, lot 20 in the eighth township and fifth range of townships, of the tract known as the Holland Land Company's land, together with divers other lots and parcels of land, the said lot being situated in the county of Erie and State of New York, for the consideration of \$13,230, which said conveyance was in fee, and contained the covenant on the part of the grantor which is set forth in the complaint in this action. The deed contained the following covenant on the part of the grantors: "And the said party of the first part, for themselves and their successors, do hereby covenant, promise, and agree to and with the said party of the second part, his heirs and assigns, that they, the said party of the first part, the above described, and hereby granted and bargained premises and every part thereof, with the appurtenances, unto the said party of the second part, his heirs and assigns, against the said party of the first part, and their successors, and against all other persons, whatsoever, lawfully claiming, or to claim, the same or any part thereof, shall and will warrant, and by these presents defend." The defendant was not, at the time of the said conveyance, in the actual possession of the premises thus conveyed, or any part thereof, but the same was at that time in the actual possession of other parties, parcels thereof being in the possession of different parties, each of such possessors claiming to own the parcel so possessed by him, in hostility to the title of the said defendant, and under color and claim of title in himself. That the undivided one half the title to said lot 20, so conveyed to said Horace Frizelle, together with the covenant of warranty aforesaid, except as against said adverse possessors, by the operation of sundry mesne conveyances, became vested in the plaintiff in May, 1861. Neither the

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said Horace Frizelle, the grantee of the defendant, or any one claiming under him, ever entered into possession of the said lot No. 20, or any part thereof. That in September, in the year 1867, an action, commonly called an action of ejectment, was commenced against each of the occupants of said lot No. 20, to recover the possession of the undivided one half, that portion of the premises held by him, making six actions in all, which actions were commenced and prosecuted in the name of the Farmers' Loan and Trust Company as plaintiffs, and the complainants therein alleged title in it on the 1st of June, 1852; all of which six actions were tried at the circuit court held in Erie county in June, 1868. In each of said actions the title of the Farmers' Loan and Trust Company was given in evidence, and in each of said actions the defendant recovered judgment, upon the ground that he and those under whom he claimed had held the possession of that portion of said lot described in the complaint, in the action against him, adversely to the title of the Farmers' Loan and Trust Company, its predecessors and successors, for more than twenty years next prior to the commencement of the said action. And in the said six actions, title by adverse possession as against the Farmers' Loan and Trust Company, its predecessors and successors, was established as to the whole of said lot No. 20. The said six actions were commenced, in fact, by the plaintiff in this action, for his own benefit, and for the purpose of recovering possession of the said undivided half of said lot No. 20, claimed by him under the said grant to Horace Frizelle, and the subsequent conveyances, and notice was given by the plaintiff in this action, to the defendant in this action, of the commencement of the said six actions of ejectment, and of the object thereof; and the said defendant in this action was required, by the plaintiff in this action, to maintain the title of the said Farmers' Loan and Trust Company to said lot No. 20, as conveyed to

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said Horace Frizelle, in the said six actions of ejectment; and the defendant in this action, by its attorney and counsel, appeared and took part in the trial of said six actions of ejectment.

On the trial of this action, evidence was given on the part of the plaintiff, tending to show that some parts of the said lot No. 20 had been held adversely by the predecessors of the defendants in the six actions of ejectment, for more than twenty years prior to the date of the deed from the Farmers' Loan and Trust Company to Horace Frizelle. It did not appear that any attempt had ever been made to recover possession of said lot 20, or any part thereof, by any person claiming under the same title conveyed by the Farmers' Loan and Trust Company to Horace Frizelle, until the commencement of the said six actions of ejectment, in September, 1867.

As a conclusion of law upon the foregoing facts, the referee determined that the plaintiff was not entitled to maintain this action against the defendant, for the reason that the said plaintiff had not been evicted from the possession of the said lot No. 20, or any part thereof; and he directed judgment for the defendant, with costs.

The only questions before the court were these:

1st. Granting that this covenant is a covenant for quiet possession, can a recovery be had for a breach of it without actual possession of the warranted premises; or is a constructive possession, arising upon a delivery of the granted premises, recognized in this State, and sufficient to maintain the action in cases where the grantor's title is manifestly bad, and the covenantee is unable to get possession. 2d. Is the covenant in question in fact a covenant for quiet possession, or a covenant warranting and guaranteeing the ownership of the granted premises—the soil—to the grantee, and therefore not falling within the rules heretofore applied in this State to strict covenants for quiet enjoyment.

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F. G. Salmon, for the appellant.

I. Since the abolition of livery of seisin and the statute of uses in this State, the execution and delivery of a conveyance of premises passes the possession of them from grantor to grantee, as against the grantor and all in privity with him, and the grantor is estopped by his deed from denying the grantee's possession. 1. Formerly no conveyance of land without livery of seisin gave any title to the land attempted to be conveyed. 2. The covenant of warranty being annexed to the land, and no land passing, even as between grantor and grantee, no action could be maintained on the covenant until the grantee had obtained actual possession. 3. When the statute of uses went into operation, livery of seisin in certain modes of conveyance became unnecessary, because the statute passed the possession, and the bargainor or releasor was, by his deed, estopped from denying the releasee's or bargainee's possession. It was well settled that no actual entry need be proven. 4. An investigation of early English cases shows that since the passage of the statute of uses in England, an actual entry is not necessary to maintain an action on a covenant for quiet enjoyment. Constructive possession and eviction are recognized. (*Clarke v. Hooper*, *Freeman*, 122. *Ludwell v. Newman*, 6 T. R. 458. *Hawkes v. Orton*, 5 Ad. & El. 367.) In the first of the above cases the warranted premises had been previously conveyed by the king, to whom they rightfully belonged. A demurrer on the ground that the plaintiff did not allege any entry, was overruled. The court say, "having shown a title in the patentee of the king, which is admitted, the plaintiff shall not be forced to enter," &c. In *Ludwell v. Newman*, the court say, "defendants covenant for quiet enjoyment means a legal entry and enjoyment without the permission of any other person, which could not have taken place here on account of the prior lease granted," and judgment was given for the plaintiff. And in *Hawkes v. Orton*, the court

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say, "that a refusal to give possession would, if properly pleaded, be a breach of a covenant for quiet enjoyment." (See *Rawle on Covenants*, 255.)

II. The courts of this State recognize the doctrine of constructive possession, and that the execution and delivery of a deed of premises vests the possession of the granted premises in the grantee, as against the grantor and those in privity with him. 1. Livery of seisin, or actual possession, is not necessary. (3 *R. S.* p. 29, § 156, 5th ed.) 2. The execution and delivery of a conveyance of premises draws the possession of the granted premises after it, when they are vacant. (*Van Brunt v. Schenck*, 11 *John.* 385. *Proprietors of Kennebeck v. Call*, 1 *Mass.* 484. *Mathew v. Trinity Church*, 3 *Serg. & R.* 514.) 3. Such execution and delivery has the same effect as to occupied premises as between the grantor and grantee, for it is a valid and good conveyance, and operative to all intents and purposes, except as against adverse possessors occupying adversely under a title. (*Jackson v. Demont*, 9 *John.* 55. *Kenada v. Gardner*, 3 *Barb.* 589. *Poor v. Horton*, 15 *id.* 485. *Howard v. Howard*, 17 *id.* 663.) 4. The adverse occupant under a title can alone avail himself of the objection that the grantor was not in possession at the time of the conveyance; the objection is not open to the grantor, and the lack of possession being the foundation of the objection, the grantor cannot set up lack of possession as between himself and the grantee. (*Poor v. Horton*, and other cases, cited *supra*.) 5. The adverse occupant must claim under a specific title; nothing less will prevent the possession of the granted premises vesting in the grantee, even as against him, or deprive him of his right to maintain ejectment. (*Fish v. Fish*, 39 *Barb.* 513. *Crary v. Goodman*, 22 *N. Y.* 170. *Holdred v. Styles*, decided in *Court of Appeals* in 1862, not reported; referred to in *Newton v. McLean*, 41 *Barb.* 289.) 6. The action of ejectment is a possessory action, and cannot be maintained except upon the theory

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that the plaintiff has had a possession which has been disturbed, for when the deed is void, as against the adverse occupant claiming under a title, the grantee must count upon the possession of his remote grantor, who was possessed. (*Poor v. Horton, and cases cited under subd. 3, supra.*)

7. If, at the time of the delivery of the deed to the grantee, the adverse claimant *was* in the actual possession, though not under a title, then it follows that the grantee (plaintiff in ejectment) *was not* in the actual possession, and he is allowed to maintain his action of ejectment upon the theory of a *constructive* possession in him, which the law recognizes, and how could he have obtained that by the mere delivery of the deed of the granted premises, which is a symbolical delivery of possession to him by his grantor?

8. The deed, which vests the constructive possession of the granted premises in the grantee, has the same operation as respects the covenantee, where the same party is made grantee and covenantee by the same instrument. If the grantee can maintain ejectment, he can also maintain covenant, for the foundation of both actions is the same, to wit, possession and a breach of it. 9. Can it be reasonably contended that a grantee of premises adversely occupied, is both in possession and not in possession, for the purposes of two actions, the right to maintain which rests on one and the same foundation. The proposition is so absurd that it has been rejected in every State of the Union, except New York and Virginia.

III. The recognition of a constructive possession, necessarily involves the recognition of its breach, or the doctrine of constructive eviction. The recognition of constructive possession has caused constructive eviction to be recognized in the following countries and States: Great Britain: *Clarke v. Hooper, Ludwell v. Newman, Hawkes v. Orton, (supra.)* Maine: *Curtis v. Deering, (12 Maine, 501.)* Vermont: *Phelps v. Sawyer, (1 Atk. 158;)* *Park v. Bates, (12 Verm. 381;)* *University of Vermont v. Joslyn, (21 id. 52.)*

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New Hampshire: *Loomis v. Bedel*, (11 *N. Hamp.* 74.) New Jersey: *Müller v. Halsey*, (2 *Green*, 49.) Tennessee: *Randolph v. Meeks*, (*Mart. & Yerg.* 58.) Alabama: *Caldwell v. Kirkpatrick*, (6 *Ala.* 60;) *Banks v. Whitehead*, (7 *id.* 83.) •Mississippi: *Dumas v. Heath*, (11 *Sands & M.*, 206;) *Witty v. Hightown*, (12 *id.* 473.) Kentucky: *Camman v. Kenedy*, (3 *Littell*, 123;) *Barnet v. Montgomery*, (6 *Monroe*, 628.) Illinois: *Moor v. Vail*, (17 *Ill.* 185.) North Carolina: *Grist v. Hodges*, (3 *Devereux*, 203.)

IV. Of breach of covenants there are two kinds—actual and constructive. Of actual, there are three kinds: 1. When the actual dispossession is by process of law consequent upon a judgment or decree. 2. Where the actual dispossession is caused by the exercise of the common law right of entry. 3. Where the possession is voluntarily and actually abandoned and surrendered to the adverse title. Of constructive eviction there are four different kinds: 1. Where the covenantee has never had possession, never having been able to obtain it by reason of the adverse title. 2. Where, after the paramount title has been established, he accepts a lease or other conveyance under it, remaining in possession. 3. Where the covenantee does this, though the adverse title has not been established, thus taking on himself, in his action on the covenant, the establishing of the adverse title. 4. When the eviction is not of the land, but of something incidental to its enjoyment. (*Rawle on Covenants*, 251, and cases cited.)

V. Actual damages are recoverable, and awarded, for purely constructive breaches of covenants for quiet possession. Though the breach be purely constructive, yet the grantee actually loses the warranted premises for which a consideration has been paid; the damage he suffers—his loss—is actual, and demands actual compensation as its remedy. (*See all cases cited under third point.*)

VI. The judgments in the six actions of ejectment constitute a constructive eviction from the warranted prem-

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ises, and a disturbance of the warrantee's possession. Where the grantee has not been able to get possession, and has failed in his action to recover it, the judgment in that action constitutes an eviction in all cases in which constructive possession is recognized. (*Rawle on Cov.* 251, and cases cited under third point.)

VII. The breach of the covenant took place upon the rendition of judgments in the actions of ejectment, and no sooner. 1. The finding of the referee that the plaintiff is the owner of the covenant, &c., is conclusive on this point, because, had the breach occurred sooner, the covenant would have been severed from the land, and not have passed by the mesne conveyances as conveyances of the land only. 2. There can be no breach until the covenantee has either been evicted or established the adverse title. In cases in which actual possession has been had, the breach dates, of course, as of the time of actual dispossession. In cases of constructive possession, the eviction is of the date when the grantor's title is adjudged bad, or the warrantee attorns to the adverse title. 3. Until that time the covenantee is in possession as against his covenantor, and it is the rendition of the judgments adjudging the covenantor's title bad that determines his possession, even as between them. 4. That this is so, is proven by the fact that the covenantee can bring suit on the covenant, and take on himself the burden of establishing the adverse title in that suit; the judgment therein operating, first, to establish the eviction of the covenantee, (which thus does not take place until the covenantor's title is adjudged bad;) and, second, to give damages for the eviction. 5. The proposition contended for accords with the old English common law on the subject, to wit, when the covenantee's title was called in question, he could, by a writ of *warrantia chartæ*, call in and make his warrantor a party to the action; and the same judgment which declared the warrantor's title worthless, set apart other land

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of his to the warranty as compensation for those lost. (*Rawle on Cov.* 205.)

VIII. Admitting, for argument's sake, that the covenant was broken upon the delivery of the deed from the company to Frizelle, and that the mesne conveyances are inoperative, even as between grantor and grantee, to pass either the land or the covenant, still those conveyances are equitable assignments of the claim for damages for the breach of the covenant. 1. If the deed from Frizelle to Israel Smith passed neither land nor covenant, then, in equity, it should pass to the grantee the only right or remedy growing out of the entire transaction which the grantor had. 2. It has been held in this State, that a deed given under a void statutory foreclosure, and which, therefore, passed nothing in the land to the purchaser, operated as an assignment of the mortgage to the extent of the purchase money paid—which is exactly analogous to the proposition contended for. (*Grosvenor v. Day, Clarke*, 109. *Jackson v. Bowen*, 7 *Cowen*, 14.)

IX. This claim—chase in action—passes by assignment. 1. The assignability of things in action is now the rule, their non-assignability the exception. (*Butler v. N. Y. and Erie Railroad Co.*, 22 *Barb.* 110.) 2. All claims which survive to the representatives of the party are assignable; this is the test of their assignability. (*Robinson v. Weeks*, 6 *How. Pr.* 161. *Hoyt v. Thompson*, 5 *N. Y.* 320, *opinion per Paige, J.*, 347. *Meech v. Stoner*, 19 *N. Y.* 26.) 3. It is of no importance whether the assignment passes the legal title or not. Whether the assignee's title be legal or equitable, if he have the whole interest he can maintain an action in his own name. (*Hastings v. McKinley*, 1 *E. D. Smith*, 273; *affirmed Seld. Notes*, n. 4, 19.)

X. The plaintiff is not barred by the statute of limitations, from asserting this claim for damages, which at the commencement of this action was 19 years old. 1. This action is upon a clause contained in a sealed instrument.

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(*Code*, § 90.) 2. The statute of limitations has not been specially pleaded in bar, which renders the defense unavailable.

XI. The title of the adverse claimants is good as to the whole of the granted premises, and that title did not ripen subsequent to the time of the delivery of the deed from the company to Frizelle. 1. The judgment in the six actions of ejectment establish the adverse title as to the whole of the premises as far back as the dates found by the justice upon the trial of the ejectment suits, to wit: 1841, 1843, 1842, 1837, and so far the records estop the defendant. 2. The adverse title being once established to be good, the presumption at once attaches that it always was good, and that of the warrantor always bad; and this presumption runs back indefinitely. The burden, then, of showing that the covenantee lost the premises by his own laches rests on the warrantor. 3. The presumption that the company's title was always bad, is strengthened by the plaintiff's testimony given for himself, showing the adverse occupation of the premises as early as 1816, 1820, 1821. 4. The records in the ejectment suits are no evidence that the adverse possession commenced at the times mentioned in the judge's findings therein. The findings merely say that at a certain time a certain person was in the occupation of said premises, claiming to own them, &c.; but they do not say he was the first occupant. On the contrary, some of those persons mentioned went in under deeds; which fact proves a prior occupancy. 5. The cross-examination of the plaintiff's witnesses neither destroys the presumption raised by the records, nor contradicts the evidence given on direct examination; because adverse possession of land under claim not written, is of two kinds: 1st. When it has been protected by a substantial inclosure. 2d. Where it has been usually cultivated and improved. (*Code*, § 85.) The cross-examination merely proves that a part of the prem-

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ises were not inclosed. The witness, on cross-examination, says that "it (the whole tract) was farmed." So that the testimony given on direct-examination, that the *premises*, i. e., the whole premises, were *cultivated*, is in no degree shaken. 6. The presumption of an adverse possession running back indefinitely, raised by the record, rests on a two-fold basis—inclosure and cultivation; and even if the first be destroyed by the cross-examination, the latter still remains unshaken. 7. The cross-examination is too indefinite to prove anything. The presumption of adverse possession covers and attaches to each and every year, hour and minute in its backward passage; and in order to shake that presumption, it was necessary to prove, clearly, that at some time subsequent to 1832 the lands, or some portion of them, were both uncultivated and uninclosed. 8. There is no such proof.

XII. The covenant is not a covenant for quiet enjoyment, merely. It is a covenant warranting the ownership of the premises to the grantee. 1. The word *possession* is not to be found in the covenant. 2. The defense of the premises—the soil itself—and not the *possession* of them, is warranted. 3. This covenant is a real covenant; is annexed to and passes with the lands, and everything that causes a loss of the soil is a breach of it. 4. No reason exists for extending the harsh and injurious rule applicable to strict covenants for quiet possession, to covenants which do not strictly refer to possession only. It is the duty of courts to exercise their ingenuity in excepting cases from the operation of the rule on very slight distinctions; even as the English courts did to avoid the harsh and unjust restrictions upon the alienation of land.

XIII. An appellate court should consider the principles applicable to a recovery on strict covenants for quiet enjoyment, *de novo*. 1. A long period has elapsed since any authoritative decision on the point. 2. In all the cases

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decided since 1831, the change marked in the law by the abolition of livery of seisin, and the statute, seems never to have been taken into consideration. 3. The latest decisions concerning the effect of a delivery of a deed are inconsistent with the former decisions, to the effect that constructive possession is not recognized in this State. 4. The right of the court so to do is undoubted. (*Ram on Legal Judgment*, ch. 14, § 1, p. 112; § 3, pp. 121-123; § 4, pp. 125, 126, 161. *Sugden on Laws of Judgment in House of Lords*, p. 21, §§ 18 to 26. *Miller v. Emans*, 19 N. Y. 384, overruling *Pelletreau v. Jackson*, 11 Wend. 110, and *Edwards v. Varick*, both in court of errors, decided by a vote of 15 to 1.)

XIV. No uncertainty, hardship or injury can result from a repudiation of the doctrine that actual possession must be had in order to recover upon a covenant for quiet possession. 1. If the courts distinctly recognize that constructive possession is a part of the law of this State, and distinctly overrule all cases to the contrary, there can be no less certainty in the law than now. 2. The only parties affected by the change would be those who would become liable to refund moneys they have received without giving anything in return; a class of persons certainly not entitled to much consideration at the hands of courts of law and equity. 3. The change would relieve many who have suffered injury, and are without redress.

John Ganson, for the repondent.

The covenant, contained in the deed of the defendant to Horace Frizelle, was, in effect, for the quiet enjoyment of the premises therein described. The covenant is to warrant and defend the premises, which means the possession of the premises. (*Ingersoll v. Hall*, 30 Barb. 392. *Van Slyck v. Kimball*, 8 John. 198.)

II. The plaintiff, in order to maintain an action for the breach of the covenant for quiet enjoyment, must show

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that he has had possession of the premises, and has since been evicted therefrom. (*Waldron v. McCarty*, 3 *John*. 471. *Kortz v. Carpenter*, 5 *id.* 120. *Kerr v. Shaw*, 13 *id.* 236, *Van Slyck v. Kimball*, 8 *id.* 198. *Miller v. Watson*, 5 *Cowen*, 195. *Hunt v. Amidon*, 4 *Hill*, 345. *Whitbeck v. Cook*, 15 *John*. 483. *Fowler v. Poling*, 6 *Barb.* 165. *Kelly v. Dutch Church*, 2 *Hill*, 105.)

III. If the adverse possession, at the time the covenant was made, was an eviction, or operated as a breach of the covenant in question, then the right of action accrued at once, and did not pass by the subsequent conveyance to the plaintiff. The moment the covenant was broken, it ceased to run with the land. The right of action having arisen, being a mere chose in action, would not pass to a grantee of the land.

IV. The plaintiff, on the evidence in this action, could not recover in any event. The adverse possession had not ripened into a title in 1852, when the defendant entered into its covenant. If the actions to recover the possession of the premises had then been commenced, they would have been successful. The rights of the parties must be determined as they were when the covenant was made. The plaintiff cannot ask any benefit from a claim which, by his laches, or the laches of his grantors, has been suffered to ripen into adverse possession. (*Ireland v. Bircham*, 29 *Eng. Com. L.* 266.)

By the Court, JOHNSON, J. The covenant on which this action was brought is the general covenant, to warrant and defend the premises conveyed, against all lawful claims. This covenant, as had been repeatedly held, includes the covenant for quiet enjoyment, and the true meaning of it is, that the grantee and his heirs and assigns shall not be deprived of possession by force of a paramount title. It

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runs with the land, and passes with the fee to any subsequent grantee of the same title.

Whatever may be the rule elsewhere, it is certainly well settled in this State, by a long and uniform course of adjudication, that such a covenant is only broken by an actual eviction from the premises. The rule as laid down by *Kent*, in his *Commentaries*, on this question, has always been followed in this State, and is too well settled to be changed or disturbed, at this day, even were a change desirable, which I think it is not. (4 *Kent's Com.* 471. *Waldron v. McCarty*, 3 *John.* 471. *Kortz v. Carpenter*, 5 *id.* 120. *Kent v. Welch*, 7 *id.* 258. *Vanderkarr v. Vanderkarr*, 11 *id.* 122. *Kerr v. Shaw*, 13 *id.* 236. *Whitbeck v. Cook*, 15 *id.* 483. *Rickert v. Snyder*, 9 *Wend.* 416. *Beddoe v. Wadsworth*, 21 *id.* 120. *Fowler v. Poling*, 6 *Barb.* 165. *Bank of Utica v. Mersereau*, 3 *Barb. Ch.* 528. *Ingersoll v. Hall*, 30 *Barb.* 392.)

The plaintiff here has never been evicted, as he was never in possession. No one ever went into possession under or through the grant to Frizelle; consequently actual eviction from the premises, as derived from that grant, was impossible. Without possession there can be no actual eviction. At the time of the grant to Frizelle, the premises were in possession of other persons claiming adversely to him and to the defendant, his grantor. Those persons, and others claiming under them, were permitted by Frizelle and those deriving title from or through him, to remain undisturbed until their adverse possession ripened into a good title as against Frizelle. The plaintiff and others, claiming under or through Frizelle, have not lost their land by a title paramount, existing at the time the covenant in question was made by the defendant, but by their own laches in suffering an imperfect and inferior claim of title to become a legal title paramount to theirs. In any view the plaintiff could not be allowed to recover for a failure of title by such means.

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The judgment of the special term must therefore be affirmed.

Justice TALCOTT, who tried the action as referee, did not sit in the case.

[FOURTH DEPARTMENT, GENERAL TERM, at Buffalo, June 6, 1870. *Mullin*, P. J., and *Johnson*, Justice.]

DANIEL BURDICK, plaintiff in error, *vs.* THE PEOPLE, defendants in error.

Whenever a prisoner on trial puts his general character in issue by his own act, he takes the risk of its being proved bad, and of every presumption which such proof legitimately raises against him. L

And so, where a prisoner, upon trial on an indictment for a felony, avails himself of the privilege granted by the statute of 1869, (*Laws of 1869, ch. 678*), of testifying as a witness in his own favor, he necessarily puts his general character and credibility as a witness, in issue, and makes it the proper subject of evidence on that question.

When he makes himself a witness, he becomes subject to all the rules applicable to other witnesses, notwithstanding his other character, of a party on trial for a felony. L

The statute which allows a prisoner upon trial for a crime, to become a witness in his own behalf, at his own election, does not protect him from being impeached, the same as any other witness. ✓

Where, upon a trial for murder, the question raised by the prisoner's testimony was, whether, situated as he was, there was reasonable ground for an apprehension, on his part, of a design on the part of the deceased, to do him, the prisoner, some great personal injury, and to believe there was imminent danger of such design being accomplished; and the judge charged, as matter of law, that the homicide was not justifiable, even if the jury believed the facts and circumstances at the time, and before, the firing of the pistol which produced it, were as stated by the prisoner in his testimony; *Held* that the question was clearly a question of fact for the jury, and not a question of law for the court; and that the charge was erroneous because it took the question from the jury, entirely. L

WRIT of error to the Cattaraugus oyer and terminer, to remove an indictment and conviction for murder.

On the trial, the defendant, Burdick, was sworn and ex-

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amined as a witness in his own behalf. At the close of his testimony, the counsel for the people offered to prove the general character of the prisoner, for the purpose, and only purpose, of impairing the force and weight of his evidence with the jury. The counsel for the prisoner objected to any proof as to the bad character of the prisoner, on the grounds, 1st. That the bad character of a prisoner on trial for a felony cannot be given in evidence as tending to prove the guilt, although he may have been sworn as a witness on his said trial in his own behalf. 2d. That the evidence was improper, immaterial and incompetent. The court overruled the objection and received the said evidence. To which decision and ruling the counsel for the prisoner duly excepted. The people then gave evidence tending to prove that the general character of the prisoner was and is bad, and that in the opinion of the witnesses he was not entitled to credit under oath. The evidence being closed, the court charged the jury, among other things, that if they believed the facts and circumstances at the time, and before the firing of the pistol which killed Baker, were as stated and detailed by the prisoner in his evidence, and that the deceased had hold of the person of the prisoner as stated by him in his evidence, then the prisoner was not, in the law, justified in taking the life of the deceased. To which charge and decision the counsel for the prisoner excepted.

D. H. Bolles, for the plaintiff in error.

I. The admission of testimony as to the prisoner's bad character, though limited by the court to purposes of his impeachment as a witness, was, it is submitted, incompetent. 1st. Prior to the statute of 1869, (*ch.* 678,) evidence of the general bad character of a defendant was, in criminal proceedings, inadmissible, unless the defendant himself provoked the scrutiny, by testimony of general good character, introduced by himself. (3 *Greenl. Ev.* § 25.

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1 *Phil. Ev.* 765, 4th ed. *People v. White*, 14 *Wend.* 112. *People v. White*, 24 *id.* 520. *People v. Bodine*, 1 *Denio*, 281.) So rigid and inflexible was this rule, and so strenuous were the courts in its enforcement, that it has been held erroneous for the judge in his charge at the trial, to suggest to the jury an inquiry why the prisoner had given no evidence of her general character, (*People v. Bodine, supra*;) or even to call the attention of the jury to the absence of such evidence. (*People v. White*, 24 *Wend. supra.*)

2d. The act of 1869 removes the common law disability of a defendant in criminal proceedings, and provides that he shall be deemed a competent witness, if he desires to testify. Does it also remove the common law disability of the prosecution to impeach his character? We submit it does not. (a.) The act was designed for the protection of the defendant. This is apparent both from the fact that it emancipates him from the silence the law had previously imposed, and also from the fact that, by an express provision, his silence, if he sees fit to preserve it, shall not create a presumption against him. But, if the theory of the prosecution is sound, the act, instead of conferring a privilege, embodies an intolerable hardship. A public accusation stirs up against the accused all the latent scandal in the community in which he resides, stimulates into common talk all the jealousies and enmities hitherto dormant, of parties who have conceived cause of offense against him, and puts in motion a legion of reckless, malicious and mischief-making tongues. Thus a reputation is created, wholly bad and grossly unjust, and witnesses summoned to speak of his character, will draw no fine distinctions as to time, however important, and will confound, perhaps honestly, his reputation prior to the commission of the alleged offense, with that which hatred and clamor have created afterwards. In nine cases out of ten, a man of reputation, before unblemished, testifying as a witness under indictment, would be met by a cloud of impeaching

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witnesses, particularly if the crime with which he stood charged was of a heinous and exciting character. Jurors are quite as indiscriminating as witnesses, and in spite of warnings and limitations on the part of the court, would, in the vast majority of cases, allow the impeaching testimony to prejudice their minds against the defendant, not merely as a witness, but as the party accused; not simply upon the question of his credibility, but upon the direct question of his guilt. Again, on the other hand, in spite of the protective character of the act in that behalf, it cannot be disputed that a jury would be irresistibly tempted, by the failure of the defendant to offer himself as a witness, to indulge in harmful presumptions of greater or less strength against him. If, therefore, the theory of the prosecution in this case is sound, the law in practice subjects the defendant to two merciless alternatives. If he avails himself of his ability to testify, he is liable to impeachment, with all its disastrous consequences of jury prejudice. If he refrains from testifying, he is impaled upon the instant and direct inference of his guilt. (b.) Prior to the passage of this act, two disabilities, pertinent to the question now under consideration, attended every stage of a criminal proceeding—one resting on the defendant, the other on the prosecutor. Both were common law disabilities, and the latter was a defendant's common law privilege. The one precluded the defendant from being a witness. The other precluded the prosecution from attacking his general character. The former was abolished by the express terms of the act, which was designed for the protection of the prisoner, while nothing was expressed or intimated by the act in relation to the latter. Can it be claimed with any show of reason, that while a new privilege was conferred upon him by express language, an existing and important immunity was taken from him by implication? It would seem as if the settled rule of construction, that a statute in derogation of the common law should be strictly

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interpreted, and that no unexpressed significance should be interpolated in it, applies with peculiar force to the present case, and that the ancient exemption of a defendant from impeachment of his general character should stand unimpaired, until overthrown by positive and explicit enactment.

II. The charge of the court, as stated in the bill of exceptions, to the effect that the testimony of the defendant, even if the jury believed it, did not warrant a conclusion of justifiable homicide, was, it is submitted, erroneous. According to the prisoner's statement, he was, just before the homicide, engaged in the prosecution of a business of his own, in which the deceased had no concern whatever, upon a public street in the village of his residence, where he had just as perfect a right to be as had the deceased himself. With that business, and with his progress along the street, the deceased unwarrantably interfered, saluting him with opprobrious epithets and preventing him from reaching his house. He then caught him by the throat with one hand and held him fast with the other. The defendant told him to let go, which he refused to do; endeavored to release himself, but found it impossible. To frighten the deceased from his hold, after urging him to refrain, and vainly exerting himself to escape, he fired two shots in succession, as a warning, and finding this of no avail, and that he was no longer able to stand the grasp upon his throat, he shot again, and this time at the deceased, designing to wound, but not to kill. If the statute relating to justifiable homicide, and the authorities adjudicating its construction, were ever applicable to any case, they were applicable to this. The defendant, without any fault of his own, was placed in a position where "there was reasonable ground to apprehend a design to do him some great personal injury," and reasonable ground to apprehend that "there was imminent danger of such design being accomplished. (2 R. S.

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part 4, art. 1, tit. 2, ch. 1, § 3. *Patterson v. The People*, 46 Barb. 625. *The People v. Sullivan*, 3 Seld., 396. *Shorter v. The People*, 2 Comst. 193. *The People v. Austin*, 1 Park. Crim. Rep. 154. *The People v. Cole*, 4 id. 35.)

M. T. Jenkins, (district attorney,) for the people.

I. It is claimed by the plaintiff in error that the testimony impeaching his character, was not competent. By the statute of 1869, the prisoner was made a witness, if he chose to be so, in his own behalf; and his evidence is to be weighed by the jury as they would weigh the evidence of any other witness; and the rules of law which apply to witnesses generally, apply to the prisoner as a witness. His character may be impeached for truth and veracity; and for that purpose, and that alone, was the evidence offered. In law it has no other effect; and when the prisoner took the witness stand, he thereby opened the door for that class of evidence, just as much as though he had given evidence of his own good character. The jury have no right to take into consideration the bad character of the prisoner, in determining his guilt or innocence; but the danger that they may do so, is no objection to the evidence.

II. The court charged the jury that if they believed the statement of the defendant, as a witness, to be true, the prisoner was not justified in the killing of Baker. To this charge the defendant's counsel excepted. The only question is, should the question of justification have been submitted to the jury, or had the court the right to decide as a question of law, that the facts as sworn to by the prisoner, did not amount to justifiable homicide, under the statute. The statute is, when the homicide be committed in the lawful defense of such person, &c., when there shall be reasonable ground to apprehend a design to commit a felony, or to do some great personal injury; and there shall be imminent danger of such design being ac-

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complished; if such facts exist, then the homicide will be justifiable. If none of the facts contemplated by the statute exist, then it is for the court, and not the jury, to say whether the homicide be justifiable. (*People v. Shorter*, 2 N. Y. 193.) The court said, in that case: "There is no color for calling it justifiable homicide, or for leaving any such question for the jury." Was there any fact in the statement of the prisoner that would justify the jury in finding the homicide justifiable? The fact that Baker had taken the prisoner by the throat, would not warrant such a finding. The law holds life too sacred to allow it to be taken on such provocation as that. These acts do not indicate, in the least, that the deceased was about to commit a felony upon the person of the prisoner, or to do him any great personal injury. They are not such acts as the law demands, to justify one person in taking the life of another. And further, the statute says there must not only be a reasonable ground to apprehend a design, &c., but there shall be imminent danger of such design being accomplished. Was there any evidence given by the prisoner that would warrant the jury in saying that imminent danger existed? (*Wharton*, § 1020.) "To excuse homicide upon the ground of self-defense, there must always appear to be such a degree of necessity as may reasonably be deemed inevitable. The danger must be actual and urgent."

III. Before the prisoner could be justified in the killing of Baker, it must appear that he did all he could to avoid the killing, and to escape from danger. (*People v. Shorter*, 2 N. Y. 203. *People v. Cole*, 4 Park. 35. *Russ. on Crimes*, 68.) In the case last cited, Judge Emott says: "That before a person will be justified in killing another, it must appear that he was unable to withdraw himself from such imminent danger, and therefore should have been compelled to kill his assailant, to protect himself against his attack." There must be some fact upon which the jury

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could base their verdict in favor of the accused, that the law would sanction. That there was none in this case is very apparent. The prisoner was attacked by the deceased without any weapon, in a public street in the village of Olean, within a few rods of the residences of divers individuals, and within four rods of persons standing in the street; all of whom could have been summoned to his aid with one cry for help. But without a single effort to bring any person to his assistance, he kills his assailant, and then flees. The law will not justify the taking of human life upon such circumstances as these. When a man is struck with the naked hand, and has no reason to apprehend a design to do him great bodily harm, he must not return the blow with a deadly weapon. (*The People v. Shorter*, 2 N. Y. 203.)

By the Court, JOHNSON, J. Two questions only are raised by the counsel for the plaintiff in error: 1. Upon the exception to the ruling admitting evidence to impeach the prisoner's character for truth and veracity, as a witness; and 2d. On the exception to the charge to the jury.

The prisoner, upon the trial, voluntarily offered himself as a witness in his own behalf, and was examined in regard to all the circumstances attending the killing of the deceased, for which he was then upon trial, on an indictment charging him with the crime of murder. The people then offered evidence of the general bad character of the prisoner, for the purpose only of impeaching his character and credibility as a witness. To this the prisoner's counsel objected, on the ground that evidence of the bad character of a prisoner on trial for a felony is incompetent. The evidence was received for the purpose for which it was offered, and the prisoner's counsel excepted.

This ruling was clearly right. While the common law, in its humanity, and high regard for the rights of life and

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liberty, gives every person on trial for crime, the benefit of the presumption of previous good character, and does not, in the first instance, allow an inquiry into his previous character; yet, if the prisoner himself brings his character into question on the trial, and undertakes to show, as matter of fact, that his previous character has been good, the people may then attack it, in reply, and show, if they can, that it has been bad. Whenever a prisoner on trial puts his general character in issue by his own act, he takes the risk of its being proved bad, and of every presumption which such proof legitimately raises against him. And so where a prisoner, upon trial on an indictment for a felony, avails himself of the privilege granted by the recent statute, of testifying as a witness in his own favor, he necessarily puts his general character and credibility as a witness, in issue, and makes it the proper subject of evidence on that question. When he makes himself a witness, he becomes subject to all the rules applicable to other witnesses, notwithstanding his other character of a party on trial for felony. The statute which allows a prisoner, upon trial for crime, to become a witness in his own behalf, at his own election, does not protect him from being impeached, the same as any other witness. If it did, it would be most dangerous and pernicious in its tendency, opening a ready and inviting door to the escape of every one charged with the commission of crime. It is not for the courts to question the policy of this statute, but only to see that it is fairly interpreted, and faithfully administered. We cannot fail to see, however, that it must and will inevitably tend to make the previous character of the accused, on trial, the subject of inquiry and evidence, much more than formerly, and more in accordance with the rule and practice of the civil than of the common law. The temptation to the accused to become a witness in his own behalf, in order to ward off inculpatory testimony, or to mitigate its force, must almost always be

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very great, if not absolutely irresistible; and his becoming a witness must necessarily bring his previous character in question, as a witness, if not as a party. If he is so unfortunate as to have a bad character, even as a witness, it will be exceedingly difficult to prevent its telling against him in the scale as a party, in the minds of the jury, notwithstanding the most careful caution by the court, that it is not to be regarded as evidence in chief.

In regard to the charge, we think the exception was well taken. The judge charged, as matter of law, that the homicide was not justifiable, even if the jury believed the facts and circumstances at the time, and before the firing of the pistol which produced it, were as stated by the prisoner in his testimony. This took the question from the jury entirely. It was clearly a question of fact for the jury, and not a question of law for the court, upon the prisoner's testimony. The question raised by the prisoner's testimony was, whether, situated as he was, there was reasonable ground for an apprehension on his part, of a design on the part of the deceased to do him, the prisoner, some great personal injury, and to believe there was imminent danger of such design being accomplished. According to this testimony, the deceased had persisted in following the prisoner from street to street, at this time in the night, with threats and abusive language, and finally had seized him with a firm grasp by the throat, choking him almost to suffocation, and refused to relinquish his grasp after being warned of the consequences of persistence, and even calling for his revolver, after a warning shot had been fired, and before the fatal one was given by the prisoner. Upon this testimony it was most clearly a question for the jury to determine, whether there was reasonable ground to apprehend a design to do a great personal injury, and whether the prisoner really believed he was in imminent danger of its being inflicted upon him. The design, and the injury apprehended, must be something

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more than a mere assault and battery. The language of the statute is, "great personal injury," without further defining its extent; and there is nothing in the case which calls for any particular definition as to the measure of the injury apprehended, in order to make a homicide justifiable. It is said, on behalf of the people, that under all the circumstances the jury could not have believed the prisoner's version to be the true one, had it been submitted to them. This may be so, and yet it is no answer. We cannot say, as matter of law, that they could not have believed it, or some portion of it. It is enough that they were deprived, by the charge, of the opportunity of passing upon it, and the questions of fact arising thereon.

The conviction, judgment and sentence must therefore be reversed, and a new trial ordered.

[FOURTH DEPARTMENT, GENERAL TERM, at Buffalo, June 6, 1870. *Mullin*, P. J., and *Johnson* and *Talcott*, Justices.]

CLARK v. HOLDRIDGE.

Where a justice of the peace, acting as a court of special sessions, and having jurisdiction of the person of the defendant, and of the offense with which he is charged, imposes upon him, by way of punishment, a larger fine than he has a right to inflict, the defendant may have the erroneous judgment and sentence against him reversed and vacated, upon certiorari from the court of sessions of the county, if he sees fit to pursue that remedy. But, after such fine has been paid, no action will lie against the justice to recover back the amount.

Such a judgment is clearly erroneous, and voidable, but not void absolutely.

Where a justice acts without jurisdiction he is a trespasser; but, having jurisdiction, an error in judgment will not subject him to an action; as where, having authority to inflict a fine, he errs in the exercise of it, in measure or degree, only. In every such case, the principle of judicial irresponsibility protects the magistrate.

After a fine imposed by a justice, acting as a court of sessions, has been paid by the defendant, to the justice, to avoid imprisonment, and by the latter

58	61
59h	616
58	61
122a	238

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paid over to the county treasurer, the justice will be deemed to have received it in his judicial capacity, to and for the use of the county; and, until the judgment is avoided by reversal, no action will lie against him to recover it back, although such fine was for a larger amount than the law allowed.

APPEAL by the plaintiff from a judgment entered at the circuit, upon a trial before the court without a jury.

The action was brought to recover of the defendant the sum of \$200, which the plaintiff alleged he had been compelled by the defendant to pay, as a fine for an alleged assault and battery, of which he was convicted before the defendant, as a court of special sessions. The plaintiff claimed that the amount of the fine being over \$50, the defendant had no jurisdiction, and his acts were void.

It was stipulated and agreed between the parties that the facts were as follows: That the defendant was, on the 19th day of August, 1868, an acting justice of the peace in and for the town of Conewango, in the county of Cattaraugus, N. Y. That on that day one M. James Matteson was arrested by virtue of a warrant charging him with having committed an assault and battery on the person of Vilando Fisher, on the 16th day of August, 1868, duly and regularly issued by the defendant; that Matteson was brought before the defendant at his office in said town, where the defendant was holding a court of special sessions; that the said Matteson was then and there charged before the said defendant, with having committed an assault on one Vilando Fisher, in said county of Cattaraugus, on the 16th day of August, 1868, as charged in said warrant. That the said defendant, as such court of special sessions, arraigned the said M. James Matteson upon such charge of assault and battery; that an examination was then and there had before the defendant, and the said defendant properly held him for trial. That the said M. James Matteson elected to be tried before the defendant as such court of special sessions; that on said day

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such trial was duly commenced, and after swearing some witnesses on the part of the people, the said M. James Matteson pleaded guilty to such charge of assault and battery; whereupon the defendant, then acting as such court of special sessions, in due form sentenced the said M. James Matteson to pay a fine of \$200, and in default of the payment thereof to be committed to the common jail of said county until said fine should be paid, or he, said Matteson, be discharged by law. That the said M. James Matteson, by reason of such sentence, then and there paid the said sum of \$200 to the defendant. That the said Matteson was brought before the defendant by a constable of said county of Cattaraugus, and remained and was in his custody during such examination and trial, and until such fine was paid, when he was discharged from custody. That said defendant acted in good faith in imposing said fine, believing that he had a right to impose a fine of \$200. That he, the defendant, afterwards, and on or about the 1st day of September, 1868, paid said sum of \$200 into the county treasury of Cattaraugus county. That after such payment a demand was duly made on behalf of the said M. James Matteson, of the defendant, for said sum of \$200, with interest from the 18th day of August, 1868; that said defendant refused to pay the same, or any part thereof. That the said M. James Matteson, on the 18th day of April, 1869, for value, duly sold and assigned said demand to John Matteson, and that said John Matteson, on the 4th day of November, 1869, for value, duly sold, assigned and transferred the same to the plaintiff, who is now the owner and holder thereof, no part of which has been paid. It was further stipulated that the plaintiff might read, subject to all legal objections, upon the trial, the evidence taken by commission in this action to establish the reason why M. James Matteson paid said sum of \$200. The testimony of Matteson, referred to in the above stipulation was as follows :

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"To the fourth interrogatory he said: I paid the said sum of \$200 to prevent being imprisoned in the county jail of Cattaraugus county, New York. The defendant ordered me to stand committed till said fine was paid. I paid said fine under the fear of imprisonment; I did not pay it voluntarily. John Matteson did not pay the fine for me. I was arraigned before the defendant, and charged with assault and battery, to which I plead guilty, and was then sentenced by him, the defendant, to pay a fine of \$200, and in default of the payment thereof to be imprisoned in the county jail of Cattaraugus county till said fine was paid, and to avoid such imprisonment I paid said fine. I was, at the time of the sentence, in the custody of a constable, and fully believed that if I did not pay the fine the defendant would imprison me."

The defendant offered no evidence.

The judge held and decided as matter of law, that although the defendant, as a court of special sessions, imposed a fine of \$200 upon M. James Matteson, and he paid it to avoid being imprisoned under the sentence, still the plaintiff as his assignee could not recover back the money, because the defendant was at the time performing a judicial function, and that the defendant must have judgment against the plaintiff for costs; to which holding and decision, and to each and every part thereof, the counsel for the plaintiff duly excepted.

The following opinion was delivered by the judge before whom the action was tried.

DANIELS, J. Although the defendant, as a court of special sessions, imposed a fine of \$200 upon M. James Matteson, and he paid it to avoid being imprisoned, under the sentence, still the plaintiff, as his assignee, cannot recover back the money, because the defendant was at the time performing a judicial function. He had jurisdiction of the assignor personally, and of the subject matter

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upon which he was at the time proceeding, but erred as to the extent of his power of punishment. Under the adjudged cases this was not such an excess of jurisdiction as rendered the sentence void, and deprived him of protection under it as a court. (*Jenkins v. Waldron*, 11 *John*. 114. *Horton v. Auchmoody*, 7 *Wend*. 200. *Easton v. Calendar*, 11 *id.* 91, 95. *Weaver v. Devendorf*, 3 *Denio*, 117. *Butler v. Potter*, 17 *John*. 145.) In the last case the justice had given judgment for a greater amount of costs than he was authorized by statute to include in his judgment. The excess, it is true, was very small. But that does not affect the principle on which the decision was made. If an officer, acting judicially, may exceed the authority conferred upon him by the statute, in a case over which he has complete jurisdiction, without rendering himself civilly liable to the party affected, the principle protecting him cannot depend upon whether the excess has been large or small in its character. This case seems to be within the principle on which the one last quoted was decided, and within the rule declared in the other authorities referred to. The defendant therefore is not liable for the money received by him in payment of the fine judicially pronounced upon the person paying it. The defendant must have judgment against the plaintiff for costs.

Lewis & Gurney, for the appellant.

I. The power of the defendant, as a court of special sessions, to fine M. James Matteson, is wholly derived from statute. (3 *R. S.* 1004, § 19, 5th ed.) "Whenever a defendant, tried under the preceding provisions of this title, either by the court or by a jury, shall be convicted, the court shall render judgment thereupon, and inflict such punishment, by fine or imprisonment, or both, as the nature of the case may require; but such fine shall in no

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case exceed fifty dollars, nor such imprisonment six months." The justice having imposed a fine that he had no jurisdiction, in any event, to impose, his sentence is void. He cannot justify under it; the sentence and judgment is no protection to him. A commitment issued under it would be no protection to the officer executing it. It would be void upon its face. (*Stroud v. Butler*, 18 Barb. 327. *Clark v. Hallock*, 16 Wend. 607.)

II. It has been held that a justice "having acquired jurisdiction, an error in judgment does not subject him to an action." (*Jenkins v. Waldron*, 11 John. 144. *Horton v. Auchmoody*, 7 Wend. 200. *Butler v. Potter*, 17 John. 145.) In these cases the doctrine is laid down, that if a justice has acquired jurisdiction, and he errs in exercising it, then his act is not void, but voidable only. This is true, with the addition, if he keeps in the general scope of his authority. (*Toof v. Bently*, 5 Wend. 276. *Foster v. Gault*, 2 McMullan, 562. *Grumond v. Raymond*, 1 Conn. 39.) In the last case it was held that a justice was liable for a trespass committed under a search warrant issued by him, commanding a constable and other officers to search any suspected place. It was held in that case, that if the justice has jurisdiction, but exceeds his authority, he is liable. (13 Mass. 286. 14 *id.* 210. 3 Phil. Ev. 719-721. See notes.) We apprehend that the true rule is, that the justice having acquired jurisdiction, if he errs in the exercise of it, but renders a judgment that is within his jurisdiction to render, in that case the judgment is voidable only; but if he renders a judgment that he has in no event jurisdiction to render, his judgment is void. An officer is protected in executing an execution issued upon a voidable judgment, but he is not protected in executing one that shows upon its face that the justice rendered a judgment that he had no authority to render. The strongest case in the books to sustain the position of the defendant, is the case of *Butler v. Potter*. In that case the jus-

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tice rendered a judgment for \$16 damages and \$5.18 costs. He had jurisdiction to render a judgment for \$25 damages and \$5 costs, being \$30 in all. The judgment he did render was for \$21.18. He, of course, erred in computing the amount of costs; but in rendering the judgment he kept within the general scope of his authority, and had authority to render judgment for a larger amount than he did render. In all the cases cited by the defendant, it will be found that the judgment rendered was within the power of the court to render. It has never been held that a judgment that the court in no event had power to render, was not void.

If the court, in this case, had sentenced Matteson to be imprisoned for a term of years in a state prison, or had sentenced him to be hanged, it would not be claimed that an officer of the court would be justified in executing or attempting to execute the sentence. Why? Because the process of the court would show upon its face that the court exceeded its power, and that the judgment or sentence is therefore void. It would not be necessary in that case to secure a reversal of the judgment to prevent the judgment or sentence from being enforced. The judgment in this case is just as erroneous and void as it would have been if the justice had sentenced Matteson to be hanged; and the warrant or precept to enforce the judgment would have showed it upon its face. It seems like an absurdity to claim that a fine collected by means of such a judgment or sentence can be sustained, either by the justice or officer receiving it. The justice can have no better right to the money than a constable or jailor would have.

III. If a justice transcends the limits of his authority, he necessarily ceases, in that particular case, to act as a justice, and is responsible for all consequences. (*Weaver v. Devendorf*, 3 Denio, 117, and cases cited.) In this case Judge Beardsley cited a large number of cases.

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IV. Although the justice acted judicially in imposing the sentence, he certainly did not act judicially when he received the \$200 as a fine under said sentence. If the sentence is right, he is right in receiving and retaining the money; if the sentence is wrong, then he cannot justify under it. He has received \$200 wrongfully, and should return it. This action is not brought against the justice for imposing the sentence, but for collecting \$200 wrongfully.

V. The fact that the justice paid the money over to the county, is not a defense to this action. (*Rheel v. Hicks*, 25 N. Y. 289.) He has taken the money wrongfully from Matteson; he has no right to pay to the county, or to do anything with it but return it.

VI. The money was paid by Matteson, under duress; he was in charge of a constable, waiting to take him to jail unless he paid; he is at the mercy of the court, he can only escape imprisonment by paying; he submits to the extortion as a means of deliverance from oppression under a void sentence; he must either pay or go to jail. The money was not paid by reason of any legal obligation to pay, but was extorted from him in violation of all law. (*Osborn v. Robbins*, 36 N. Y. 365, and cases cited.)

VII. There have been numerous cases where justices have been held liable in actions for false imprisonment, in cases where they had, in fact, proceeded regularly in summary convictions, but had neglected to file records of conviction required by law. (*The People v. Phillips*, 1 Park. 95. *Morris v. The People*, *Id.* 441. *Morewood v. Hollister*, 2 Seld. 327.) It has never been doubted that justices who have assumed to do any act they had no authority to do, were liable when they did an act they had no power to do. In the cases of summary convictions, the parties have been brought before the justice regularly, and the justices have had jurisdiction of the proceeding and of the person of the offender, and have been regular in convicting the

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offender, but had no jurisdiction to make any commitment until after they had made and signed a record of conviction; and have been held liable in actions for false imprisonment because they committed the prisoner before getting jurisdiction to do so, by first making and signing a record of conviction. In the case under discussion, the justice proceeded regularly until he pronounced sentence—a sentence he had no authority to pronounce. He is liable for any act that he or any other person does under the sentence.

VIII. Penal statutes have always been strictly construed. A court of inferior jurisdiction has always been, and should be, compelled to keep within its power; no latitude or discretion has been allowed.

IX. The sentence is void in whole. A sentence that provides for punishment by fine, only, cannot be good in part and bad in part; it is either wholly good or all bad.

Jenkins & Goodwill, for the respondent.

I. The facts show the proceedings of the defendant as a court of special sessions to have been regular and proper, up to the imposition of the fine. That the defendant erred in fixing the amount of the fine is evident, but can the fine money so imposed be recovered of him? The prisoner had his remedy by writ of certiorari. (*Laws of 1859, ch. 339.*)

II. Was the sentence of the defendant a void or voidable act? We maintain the latter, according to the rule adopted by the Court of Appeals in the case of *Swift v. City of Poughkeepsie*, which is stated in 37 *N. Y. Rep.*, at page 513, in the opinion of Justice Bacon, as follows: "When a magistrate or officer has jurisdiction of the subject matter, and errs only in the execution of his power, his acts are not void, but voidable, and the only remedy is by certiorari or writ of error. The distinction is between an erroneous judgment and one rendered without

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jurisdiction. The one is valid until reversed, and the other utterly void. (*Horton v. Auchmoody*, 7 Wend. 200. *Butler v. Potter*, 17 John. 145.)

III. The imposition of the fine by the defendant as such court, being a judicial act, he is not liable therefor, however erroneous it may be, he having jurisdiction, as aforesaid. (*See cases above cited*; also, *Moor v. Ames*, 3 Caines, 170; *Easton v. Calendar*, 11 Wend. 91, 95; *Weaver v. Devendorf*, 3 Denio, 117; *Jenkins v. Waldron*, 11 John. 114; *Swift v. City of Poughkeepsie*, 37 N. Y. 511; *Voorhees v. Martin*, 12 Barb. 508; *The People v. Stocking*, 50 id. 573; *Miller v. Seare*, 2 W. Black. 1145.) The want of jurisdiction is fatal, in every court. The principal distinction between courts of general and those of limited jurisdiction is, that in one case jurisdiction will be presumed until the contrary appears; in the other, no such presumption is indulged, but the authority must be shown in every case. But when all of the preliminary steps in such a court to confer such authority have been taken, it then has all the rights and is equally protected in the exercise thereof, with those of the former class. (*See cases above cited*.)

By the Court, JOHNSON, J. The plaintiff, by his assignment, acquired no right of action against the defendant to recover back the money paid by his assignor. His assignor might have had the erroneous judgment and sentence against him reversed and vacated, upon certiorari from the court of sessions of the county, had he seen fit to pursue that remedy. (*Sess. Laws of 1859, ch. 339*.) The judgment was clearly erroneous and voidable, the fine by way of punishment having been much larger than the defendant, as a court of special sessions, had a right to inflict. But it was not void absolutely. The defendant, at the time the judgment was rendered, and the erroneous punishment inflicted, was acting as a court of special sessions, and had jurisdiction of the person of the plaintiff's

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assignor, and of the offense with which he was charged. The assignor had been regularly arrested, and examined before the defendant as the examining magistrate, and had elected to be tried before him as a court of special sessions. After the commencement of the trial, he pleaded guilty, and it thereupon became the duty of the defendant to render judgment against him, and to inflict the punishment prescribed by statute. (2 R. S. 714, § 19.) In the case of *Butler v. Potter*, (17 John. 145,) the court laid down the rule that, "where the justice has no jurisdiction whatever, and undertakes to act, his acts are *coram non judice*; but if he has jurisdiction, and errs in exercising it, then the act is not void, but voidable only." That was an action brought against a justice of the peace, who had rendered a judgment against the plaintiff, for a larger amount of costs than the statute authorized, upon a confession of judgment by the latter, before the defendant, as such justice. The plaintiff had been imprisoned on the execution issued upon the judgment, and brought his action for trespass and false imprisonment, and it was held that the action could not be maintained. This has been followed, steadily, in this State in a great number of cases, only a few of which will be here cited. (*Horton v. Auchmoody*, 7 Wend. 200. *Weaver v. Devendorf*, 3 Denio, 117. *Swift v. City of Poughkeepsie*, 37 N. Y. 511.) Indeed this has always been the common law rule. (*Prigg v. Adams*, 2 Salk. 674.) In *Horton v. Auchmoody*, (*supra*), the court say: "Where a justice acts without acquiring jurisdiction, he is a trespasser; but, having jurisdiction, an error in judgment does not subject him to an action; he is entitled to the protection afforded to a judge of a court of record." In every such case, the principle of judicial irresponsibility protects the magistrate. It would be mere ostentation to cite the numerous authorities to be found in the books, in support of a principle so well established.

The counsel for the appellant argues that the fine im-

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posed, having been so glaringly in excess of that which the defendant was authorized by statute to inflict, was as much without authority or jurisdiction as would have been a sentence that the person convicted should be hanged, or imprisoned in the state prison. But this is a confusion of ideas and principles essentially and fundamentally different. The latter sentence would have been a nullity, because the magistrate had no power or authority to inflict any punishment of that kind or quality. He had no such power ever conferred upon him, which he could exercise in any manner or degree. But, he had authority to inflict a fine, and erred in the exercise of it, in measure or degree only. And this I understand to be the true distinction between the acts of an inferior magistrate, which are *coram non judice* and void, and those which are erroneous and voidable, merely. In the latter case, such magistrate is sheltered and protected by the shield of judicial irresponsibility; in the former, not.

It is also argued in behalf of the plaintiff, that even if the defendant would not have been liable in an action of trespass for false imprisonment, had the plaintiff been committed for non-payment of the fine, still he had no authority to receive the money, the fine being thus excessive; and that the defendant cannot be regarded as having acted in his judicial capacity, in receiving such a fine, which he had no authority to impose. This position is as unsound as the other, and for the same reason. If the judgment and sentence were voidable only, the defendant is protected in the execution of such judgment, in every stage, until it is avoided by reversal. The statute requires the magistrate to receive all fines imposed by him, if paid before commitment, and to pay the same, after deducting the sum allowed for costs and charges, over to the county treasurer for the use of the county, within thirty days. (2 B. S. 716, § 32.) The money had been duly paid over to the county treasurer before the assign-

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ment to the plaintiff. The case shows that the defendant acted in good faith, throughout, supposing he was only discharging his duty as a magistrate. The judgment having been valid until reversed, and the money paid by the party convicted to avoid being imprisoned, in execution thereof, the defendant must be deemed to have received it in his judicial capacity, to and for the use of the county, and the action will not lie to recover it of the magistrate through whose hands it passed into the treasury of the county. The judgment must therefore be affirmed.

[FOURTH DEPARTMENT, GENERAL TERM, at Buffalo, June 6, 1870. *Mullin*, P. J., and *Johnson and Talcott*, Justices.]

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Where an order is made by a county court, upon a motion in an action pending in that court, an appeal to the Supreme Court from such order brings nothing into the appellate court, except the *motion*, and *copies* of the papers on which it was founded. The *action* still remains pending in the county court, and no other court can render the judgment.

Thus where a verdict was rendered in favor of the plaintiff, in the county court, but before entry of judgment thereon, the defendant moved for a new trial, in that court, which motion was granted, and then the plaintiff appealed to the Supreme Court, where the order granting a new trial was reversed, and a new trial denied, and judgment ordered on the verdict, with costs; *Held* that such judgment was irregularly and improperly entered, in the Supreme Court; and the same was set aside.

The Code has not changed the practice which formerly existed, on the subject of rendering judgments by courts of review. The "customary practice" still prevails, under rule 93 of the rules of practice.

And as there never was any "customary practice" of entering judgments by the appellate court, in a case of that nature, such a judgment is without precedent or authority to sustain it.

THE action was commenced in a justice's court, where the plaintiff recovered, and had judgment. The defendant appealed to the county court of Erie county, where a new trial was had, and a verdict for a larger amount was rendered in the plaintiff's favor. Before judgment was

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entered on the verdict, the defendant made a case containing exceptions, and moved for a new trial in that court, which was granted. The plaintiff appealed from the order granting a new trial, to this court at general term, where the order granting a new trial was reversed, with costs of the appeal, and a new trial denied, and judgment ordered in this court on the verdict, with costs of the action and the appeal. Judgment was thereupon entered in this court. A motion is now made to set aside the judgment in this court, as having been irregularly and improperly entered therein, and heard by consent at general term.

Geo. Wing, appellant, in person.

Ganson & Smith, for the respondent.

By the Court, JOHNSON, J. Had judgment been entered in the county court in the defendant's favor, instead of an order granting a new trial, on appeal from such judgment and reversal in this court, judgment would have been properly entered in the plaintiff's favor, in this court. In that case the appellate court will give such judgment as the court below should have given. This was the practice before the Code, on a case brought from an inferior, into a superior court, for review, on writ of error, and had been, from time immemorial. (*Pangburn v. Ramsay*, 11 *John*. 141. *Dunham v. Simmons*, 5 *Hill*, 507. *Graham's Pr.* 962, 2d ed. *Philips v. Berry*, 1 *Ld. Raym.* 5, 10.) The case last cited was decided in the house of lords, on writ of error from the king's bench. It was objected that the house of lords could not render judgment, on the reversal of the judgment in the king's bench, because the record was not before them, but only a transcript thereof, and therefore the king's bench ought to render the judgment. But Holt, Ch. J., said that in judgment of law the true record was before them, "for the writ of error says *recordum et processum*, and not *transcriptum*."

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He said, further, "if judgment be first given for the plaintiff, and this judgment be reversed upon error, the defendant is *in statu quo*, and then he has no need to enter a new judgment. But when judgment is first given for the defendant, and this is reversed, upon error, a new judgment ought to be entered to put the plaintiff in possession of that which he demands." And it was adjudged by all the court in the case, "that the king's bench cannot enter the new judgment for the plaintiff, because when the king's bench had given judgment upon the original, it had wholly executed its authority, so that it could do no more. And there is no precedent that ever the king's bench did enter a new judgment upon reversal in parliament of a judgment given *in B. R.*" Judgment was afterwards, upon application, entered by the house of lords. The practice was thus settled according to universal usage at that time, and it has been followed ever since in England, and in this State, in the Supreme Court. For peculiar reasons, however, the practice never obtained in our late court of errors, nor in our present Court of Appeals. The rule and the reason of it, is as applicable to appeals from judgments under the Code, as to writs of error under the former practice. The appellate courts upon the appeal have, "in judgment of law the true record before them," the same as they had formerly on writ of error. I have adverted to the rule, and the reason of it, thus at length, for the purpose of showing that it does not authorize this judgment. This judgment, in this court, upon an appeal from an order, is not in accordance with any practice heretofore known. The action was in the county court, and was never removed into this court. The action remained in that court, and was never sought to be removed into this court by the appeal. The order appealed from was made upon a motion in the action, in that court. This order only was appealed from, and the appeal brought nothing

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into this court but the motion, and *copies* of the papers on which it was founded.

When the appeal is from an order in the county court, affecting a substantial right, to the Supreme Court, "such appeal shall be heard on a copy of the papers on which the order appealed from was made." (*Code*, § 344.) The appeal here did not say "*recordum et processum*," but "*transcriptum*," only, of the motion papers. The action still remained pending in the county court. The appeal brought here the motion only, and not the action; and it was of the motion, and not of the action, that this court acquired jurisdiction by the appeal. The county court had not given judgment in the action. It had not "wholly executed its authority, so that it could do no more." But the process and proceedings remained there, and no other court could render the judgment. No remittitur to the county court is necessary or proper, as the action, with the process and proceedings, still remain in that court. It is clear that the Code has not changed the practice which formerly existed on the subject of rendering judgments by courts of review. The provisions of section 347 relate to appeals from judgments, where a judgment has been entered and judgment roll filed, and not to appeals from orders, where there has been no judgment. It does not specify which court shall enter or render the judgment, on the determination of the appeal, but leaves the practice as it formerly was, on that subject, in force. "The customary practice," therefore, still prevails, under rule 93 of our present rules. But as there never was any "customary practice" of entering judgments by the appellate court in a case like this, the judgment stands here without precedent or authority to sustain it. It must therefore be set aside, as having been irregularly and improperly entered in this court, with costs of the motion.

[FOURTH DEPARTMENT, GENERAL TERM, at Rochester, September 5, 1870.
Mullin, P. J., and *Johnson* and *Talcott*, Justices.]

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The books of a bank, not kept by either of the parties to an action, nor relating to transactions between them, but referring solely to transactions between the defendant and the bank, are not competent evidence, between the parties, to show the amount of paper which has been discounted by the bank for the defendant, and the number of notes so discounted and renewed. And a statement made up from such books is equally incompetent.

The opinion of a witness as to the value of services rendered by the plaintiff to the defendant, (1) In procuring the defendant's paper to be discounted, and procuring loans for him in that way; (2) In indorsing the defendant's paper, and thus aiding him with his credit, either by way of sale or loan of credit; (3) For time, travel and expenses in going to different banks and places to get the defendant's paper discounted and renewed, is inadmissible.

The compensation for brokerage in soliciting, driving or procuring the loan or forbearance of money being fixed by statute, it cannot be enlarged or changed, in a particular case, by any testimony.

In the case of indorsements of commercial paper, by accommodation indorsers, the law does not presume an agreement between the maker and indorser that the latter shall be compensated for the favor of his indorsement. If compensation is claimed, the indorser must show that there was a special agreement that he should be compensated for such use of his credit.

The law allows a party who becomes surety for another, by way of indorsement or otherwise, to agree upon a certain price for the use of his credit. But unless there is some specific contract fixing the price to be paid, a surety cannot recover for the use of his credit by the principal.

Opinions of witnesses are not competent to fix a price for the use of credit, where no price was agreed upon; for the reason that credit cannot be said to have any regular and current market value.

If time, travel and expense are expended or incurred by an indorser, for his principal, independently of the brokerage, the indorser may recover therefor, upon the general promise to pay, whatever sum he can prove the services to be worth, not to the defendant in the particular circumstances in which he was placed, but according to the general price and value of such services.

This may be proved by the opinions of witnesses who are qualified to judge of the value of the services.

A PPEAL by the defendant from a judgment entered upon the report of a referee.

The plaintiff and defendant, after about the 1st of September, 1858, down to and into the year 1862, had mutual,

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open and current accounts with each other. The plaintiff, during the time, kept quite an extensive jewelry establishment in the village of Lyons, and also carried on a large farm near said village. The defendant was and is a dealer in peppermint oil and produce. About the time these mutual accounts commenced, the plaintiff became the defendant's indorser, not only to raise money for the defendant's but for the plaintiff's business as well; which was accomplished by the defendant loaning to the plaintiff a part of the avails of these discounts, from time to time, as the plaintiff needed. Also, other moneys loaned to the plaintiff. These mutual accounts and accommodations between the parties continued down to late in the fall or forepart of the winter of 1860-1, when peppermint oil fell in price, and the defendant had his oil on hand, could not sell it or pay his paper, and suits were brought on some of this accommodation paper. A misunderstanding between the parties seems to have arisen, in relation to the terms of a contract for peppermint oil, made in 1860, and as to a large claim against the defendant which the plaintiff finally made for indorsing for him. To close up and settle the matters between these parties, this action was brought about the 23d day of July, 1868, and was referred to a referee. Several questions arose upon the rulings of the referee in relation to receiving evidence for the plaintiff, under and against the objections interposed by the defendant, to which rulings exceptions were taken, as well as to the findings and conclusions of the referee in his report.

The referee found, as a conclusion of law, from the facts proved, on the accounting before him, that the defendant should be charged with the sum of \$10,932.26, and that he should be credited with offsets to the amount of \$5046.81. And the referee reported that, at the date of his report, there was due from the defendant to the

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plaintiff the sum of \$5885.45, for which amount he ordered judgment for the plaintiff, with costs.

C. Mason, for the appellant.

I. The bank statement which was received and read in evidence, against the defendant's objection, is a species of wholesale testimony which would do nothing towards establishing how much service the plaintiff performed for the defendant, or give any correct data by which one could form a correct opinion of its value. (16 *Wend.* 586. 7 *Bosw.* 195. 17 *N. Y.* 134. 15 *id.* 487, 488. 6 *Duer*, 442.) The cross-examination of the witness Verplanck shows that the statement gave no correct information as to the amount of service performed by the plaintiff for the defendant, in the transactions with the Geneva bank.

II. The referee, while disclaiming the idea of allowing anything to the plaintiff, (in the absence of any contract to pay for indorsing,) except for services actually rendered, has allowed the plaintiff's witnesses, under our objections, to wholesale it all off together—services, risk, credit and annoyance—and then found for the plaintiff \$1500—about the highest amount the witnesses put it at when all estimated and lumped off together. The witness Parshall testifies: "I can't give any particular items of services, &c. The services rendered were giving the defendant credit by indorsing his paper." Again he says, "the credit the plaintiff gave the defendant, the risk he ran, and the responsibility he assumed, enters into my estimate," &c. The finding of the referee, that the plaintiff's services in aiding the defendant to raise money were justly worth \$1500, is simply robbing the defendant to put money into the pocket of the plaintiff, which he never thought of being entitled to while the services were being performed. He never even so much as charged the defendant a single day or hour for such services, or made any account of them whatever. Yet the plaintiff was

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allowed to lump off the time and the value of the services in gross, by the referee, who received the evidence against the defendant's objection. The fact that the plaintiff never charged any services to the defendant, in the account he rendered to the defendant, goes to corroborate the defendant in his statements about having paid the plaintiff as the services were rendered; and of the plaintiff's having retained pay for services out of the avails of discounts; and of the defendant's having distilled oil for the plaintiff under price, and for nothing, to compensate him for these very services and accommodations. The defendant is able to specify and give items, day and date, amounting to from \$300 to \$500, which he has rendered to the plaintiff to pay him for his accommodations; besides allowing him to take his pay out of avails of discounts, for his services, at the time they were rendered; yet all this escapes the notice of the referee, while the plaintiff's evidence is received by him in gross—without items or date, or anything else giving it the color of reliability.

III. In the absence of any agreement to pay for indorsing, we insist the plaintiff is not legally entitled to any pay for indorsing accommodation paper; and all he is entitled to is for services actually rendered. The plaintiff does not even pretend that he made any arrangement with the defendant to be paid for indorsing for him, and not even for compensation for services, till a year or more after he commenced indorsing for the defendant.

IV. The defendant swears he paid the plaintiff \$8.61, expenses to Geneva; that the plaintiff got a note of \$1000 discounted at the Bank of Geneva, and took out \$6 for expenses. Also, he says, "I always paid the plaintiff's expenses when he went anywhere for me. I knew when he or George went to get a discount they would take their expenses out of the avails." These facts, as sworn to by the defendant on the trial, were not and have not been

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disputed by the plaintiff, yet the referee has not noticed or alluded to this undisputed evidence, in his report, or set off anything on account thereof, against the claim of the plaintiff for services, but has allowed to him for such services \$1500, which the testimony shows (and much of it undisputed) have been fairly and fully paid.

V. From the whole evidence in the case, it is insisted that the findings of the referee are erroneous, and unsupported by the evidence, and against the law and the evidence, and that the judgment entered on the report of the referee should be reversed, and a new trial granted.

J. H. Camp, for the respondent.

I. The several exceptions taken upon the trial, by the appellant, are invalid. One of the material questions in this case arose upon the plaintiff's claim to compensation for services rendered for the defendant in procuring for him money, as stated in the first count of the plaintiff's complaint. This was met by the defendant's answer, and passed upon by the referee. The plaintiff claimed that, at the defendant's request, he rendered services in procuring for the defendant a large sum of money, in the nature of procuring indorsers to paper, getting paper discounted, &c.; and that the defendant agreed to pay him for such service, and all trouble the plaintiff was occasioned by reason of indorsing for the defendant. That the plaintiff procured for the defendant, at the Bank of Geneva, the sum of \$50,000 to \$60,000, and other sums at other banks, and of individuals, in all, over \$100,000. All of the exceptions taken upon the trial are as to the proof offered in reference to establishing the kind and amount of service rendered, and its value. 1. Samuel H. Verplanck, the president and cashier of the Geneva bank, was called by the plaintiff, and asked to produce a written statement taken from the books of the Geneva bank, of

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the notes and drafts indorsed by the plaintiff for the defendant, and upon which the plaintiff procured discounts for the defendant. To this the defendant objected, as irrelevant and immaterial, and that books of the bank could not show the services of the plaintiff to the defendant. No objection was taken that the evidence was incompetent or secondary. The plaintiff's claim was for services rendered in borrowing or raising money for the defendant. This schedule contained a statement of the amounts borrowed by the plaintiff upon paper indorsed by him, and the different paper upon which, and the time when, the same was borrowed. The facts to which the papers related were subsequently proved. The plaintiff indorsed all the notes mentioned in this schedule, and procured the same to be discounted for the defendant's benefit. The schedule was not offered to prove the indorsements of paper by the plaintiff, but as the memorandum from which the witness Verplanck spoke, and as containing a statement of the money borrowed by the plaintiff, for the defendant, at the Geneva bank, the borrowing of which the witness Verplanck had knowledge of, and testified to, as did also both the plaintiff and defendant. The evidence in this respect was certainly relevant and material. 2. It was proper to prove that discounts were obtained by the plaintiff for the defendant, as the plaintiff's claim was for this kind of service rendered.

II. The value of services may be proved by the opinions of witnesses who are acquainted with the value of such labor in that vicinity. 1. There was no objection taken to the competency of the witness Parshall; and therefore the witness is to be deemed competent to give the opinion asked for, if such an opinion is evidence. (*Curtis v. Gano*, 26 N. Y. 426. *Hoxie v. Allen*, 38 *id.* 175.) 2. The witness Parshall had testified that he was a banker, and had been since 1852; that he resided in Lyons; that he knew of

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the plaintiff's raising money for the defendant in the years 1859, 1860 and 1861; that he knew the plaintiff indorsed the defendant's paper and procured the same to be discounted at his (witness's) bank, and other banks. He was then asked: "Basing your answer upon your own knowledge of services rendered to the defendant by the plaintiff, in raising money, what, in your opinion, were these services worth, commencing in the fall of 1859, down to the forepart of the winter of 1862?" The amount and character of services rendered the defendant by the plaintiff had already been proved. The substance of the question then asked, was, what were those services that you know the plaintiff rendered to the defendant, during the time in question, worth; and the answer, giving the witness's opinion of the value of the services he knew the plaintiff rendered to the defendant, (the witness being presumed competent to give such an opinion, 26 N. Y. 426,) was properly received. (*Lewis v. Trickey*, 20 Barb. 387.) In the case of *Lewis v. Trickey*, Judge Johnson, in rendering the opinion of the court, said: "The referee decided correctly in allowing the plaintiff to prove the value of his services by the opinions of witnesses who were acquainted with the value of labor in the vicinity." And no objection being taken to the competency of the witness, he is deemed to be acquainted with the value of the services in the vicinity. (*Curtis v. Gano*, 26 N. Y. 426.) 3. It was not necessary that the witness should first state the services that he knew the plaintiff to have rendered to the defendant, before giving an opinion. (*Curtis v. Gano*, 26 N. Y. 426.)

III. The witness Hiram G. Hotchkiss was asked: "Did you ever hear of any one being paid for indorsing?" The objection to this question was properly sustained. The referee had ruled that the defendant could not recover for indorsing, simply. If the plaintiff could recover at all for indorsing, labor, &c., it was under and by virtue of a

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contract. And, therefore, what the witness had heard in relation to others being paid for indorsing, was immaterial.

IV. The referee correctly found that the defendant was indebted to the plaintiff in the sum of \$1500, for labor and services rendered by the plaintiff in borrowing money for the defendant. 1. The plaintiff had been, during the early part of the year 1859, indorsing for the defendant as an accommodation indorser; the defendant kept asking the favor more frequently, and the plaintiff finally said to him he could not indorse any more for nothing. The defendant urged the plaintiff to indorse, and said he would pay him for everything he did for him. The defendant says: "I think it very likely I told the plaintiff I would pay him for his time and trouble for indorsing for me." The defendant became embarrassed, and could not raise money. The plaintiff again told him he was indorsing more paper than the defendant spoke of; that if he indorsed more, he must be well paid. The defendant promised to pay the plaintiff well for his time and trouble, if he would keep along. 2. The services were worth the amount allowed by the referee. They consisted in raising for the defendant money, which he so greatly needed; not in riding over to Geneva and Palmyra, or walking to and from the banks in Lyons. The value of the services rendered consisted mainly in the fact that the plaintiff could and did raise the money for the defendant to the amount of over \$100,000; and not that the plaintiff walked to a bank, and from it again. The influence and credit of the plaintiff, which enabled him to procure the money, is what made his services valuable. The extent of services rendered by the plaintiff to the defendant will appear from the fact that he borrowed for the defendant, at different banks, and from individuals, \$117,945.95. The value of the services will appear from the fact that the defendant needed a large amount of money to carry on his business. That the plaintiff raised the money for him upon his own credit.

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In some of the banks they would not have paper with the defendant's name upon it. And the plaintiff had to procure his own indorsers, to raise money for the defendant; and was obliged to become personally liable for this money, when the defendant's circumstances were most precarious. The plaintiff urged the defendant to get another indorser. "He said he couldn't; I must keep along." The plaintiff did keep along, upon the defendant promising to pay him well for his services, and all trouble he was put to. Finally suits were threatened, and the plaintiff begged the defendant to take care of paper. The defendant was powerless. He neglected the paper, and suits were brought. The plaintiff was sued upon these obligations sixteen different times; the sum of \$22,846.43, being the aggregate amount claimed against the plaintiff in these sixteen suits. The Geneva bank alone had judgments against the plaintiff, on these matters, to the amount of \$16,000. The amount allowed by the referee, viz., \$1500, would not be one and a half per cent on the amount the plaintiff raised for the defendant. Mr. Parshall, a banker, residing in Lyons, says that the plaintiff's services in raising money at his bank were worth \$400 to \$600 a year; "that the time spent by the plaintiff was worth the amount I have stated. I don't take the plaintiff's impaired credit into account, at all." The plaintiff says, services were worth \$800 to \$1000 a year, for the two and a half years. The proof abundantly establishes that the defendant promised to pay the plaintiff for his services in the raising money for him, and for all trouble he was put to by reason of indorsing; that the plaintiff rendered these services for the defendant, and that same were well worth the sum of \$1500. The judgment should be affirmed.

By the Court, JOHNSON, J. We are all of the opinion that the judgment must be reversed, for errors committed upon the trial, in receiving improper evidence

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against the defendant's objections. We think the statement from the bank-books of the Bank of Geneva, was improperly received in evidence. This statement appears to have been received in evidence for the purpose of establishing the truth of the statements therein contained as to the amount of paper which had been discounted at that bank for the defendant, and the number of notes so discounted and renewed. The books themselves could not have been made evidence to prove these facts, and a statement made up from the books was equally incompetent. The books were not kept by either of the parties, and did not relate to transactions between them. They related solely to transactions between the defendant and the bank, a third party; and we know of no rule of evidence which could render them competent evidence between these parties. The testimony of the witness Parshall, expressing his opinion as to the value of the services rendered by the plaintiff, was also inadmissible as evidence, against the defendant's objection. It was incompetent upon several grounds. The services, as appears by the plaintiff's testimony, for which he claimed compensation, were of three different and distinct kinds, viz: 1. Procuring the defendant's paper to be discounted, and procuring loans for him in that way. 2. Indorsing the defendant's paper, and thus aiding him with his credit, either by way of sale or loan of credit. 3. Time, travel and expense in going to different banks and places to get the defendant's paper discounted and renewed. The question propounded to this witness, called for his opinion of the value of all these services combined, and he was allowed to answer, against the objection of the defendant's counsel. The value of these services under the first and second heads could not, we think, be legally proved by the opinion of any witness, however skilled or competent he might be in all matters of banking and finance. The first relates to brokage, and the compensation for that service is fixed by statute. (1 R. S.

709, § 1.) By this statute it is provided that, "no person shall, directly or indirectly, take or receive more than fifty cents for a brokerage, soliciting, driving or procuring the loan, or forbearance, of one hundred dollars for one year, and in that proportion for a greater or less sum, nor more than thirty-eight cents for making or renewing any bond, bill, note or other security given for such loan or forbearance," &c. It is clear enough that when the statute fixes the compensation, it cannot be enlarged or changed by any testimony. The second head relates to services by way of sale or loan of the credit of one to another. In the case of indorsements of commercial paper, by accommodation indorsers, the law does not presume an agreement between the maker and indorser, that the latter is to be compensated for the favor of his indorsement. If compensation is claimed, the indorser must show that there was a special agreement that he should be compensated for such use of his credit. The law allows a party who becomes surety for another, by way of indorsement or otherwise, to agree upon a certain price for the use of his credit. It has been repeatedly held that a person may loan or sell his credit to another, at a price agreed upon, the same as any other commodity; and that such contract is not usurious, when it is for that purpose only. This is quite different from brokerage. But we are clearly of the opinion that a surety cannot recover for the use of his credit by the principal, unless there is some specific contract fixing the price to be paid. If there is only a general agreement that he shall be paid something, without fixing any specific sum, we do not see how any sum could be established. It is plain, we think, that opinions of witnesses would not be competent to fix a price, where no price was agreed upon, for the reason that credit cannot be said to have any regular and current market value. There is no standard to judge by in any given case, and opinions would necessarily be mere matters of fancy and conjecture.

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The credit of one person, as all know, may afford a much firmer and more valuable support than that of another, and be of far greater advantage in every way. Much would depend, in every case, upon the quality, and there is, and can be, no market price for different grades of credit when loaned or sold. It appears from the cross-examination of this witness, that he fixed the compensation named by him, of from \$400 to \$600 per year, for the credit given by indorsing the defendant's paper alone. As to the third item, time, travel and expense, the question whether the defendant could recover for that, would depend upon whether it was a service separate from the brokerage, and was to be paid for as a separate service. It would not necessarily, or presumably, have any connection with the loan or sale of credit. They are quite different things, both in their nature and character. If this service was independent of the brokerage, the defendant may recover for it upon the general promise to pay, whatever he can prove it to be worth, not to the defendant, in the particular circumstances in which he was placed, but according to the general price and value of such services. This may be proved by the opinions of witnesses who are qualified to judge of their value.

For the foregoing reasons, the judgment must be reversed, and a new trial ordered, with costs to abide the event.

[FOURTH DEPARTMENT, GENERAL TERM, at Rochester, September 5, 1870.
Mullin, P. J., and *Johnson* and *Talcott*, Justices.]

**GEORGE RESSEGUIE and OLIVER MASON, administrators, &c.,
vs. ANTHONY L. MASON.**

Whether letters, written by one person to another, containing statements of the amount of funds therewith, or previously, sent by the writer to the person addressed, which letters were received by the latter, and retained without objection or reply, are competent or sufficient evidence to show an implied admission by the recipient of the letters, of the truth of the statements therein? *Quære.*

In an action brought against the writer of such letters, by the administrators of the person addressed, the defendant is an incompetent witness, under § 399 of the Code, to prove that the letters were written, or that they were received and retained by the person addressed.

His testimony is incompetent, as relating both a "transaction" and "communication" between the party testifying and a deceased person, whose claims against such party are the subject of the litigation.

The provisions of § 399 of the Code relate as well to written as to verbal communications.

APPEAL by the plaintiffs from a judgment entered upon the report of a referee dismissing the complaint, with costs.

The plaintiffs alleged, in their complaint, that on or about the 10th day of April, 1866, Anthony Mason, of the town of Ridgeway, Orleans county, died intestate. That the plaintiffs were duly appointed administrators of the estate of said intestate, by the surrogate of Orleans county, and letters of administration were duly issued to them as such. That the said Anthony Mason, during his lifetime, and on or about the 25th day of November, 1852, employed the defendant as his agent to loan certain moneys belonging to him, said Anthony Mason, in the State of Michigan, where the defendant then resided and still resides; such loans to be made upon good notes or bonds and mortgages; said defendant to return the money placed in his hands for such purpose, or the security taken for the same, when demanded; and at that time, and sundry other times during the years 1853, 1854, 1855 and 1856, said Anthony Mason placed in the hands of the

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defendant, for the purposes aforesaid, large sums of money, amounting in all to about \$8000; which said sums of money were taken and loaned by the defendant, in accordance with said agreement; and the interest money received had been also reinvested, and the defendant had received and collected, or now holds in his hands, notes, bonds and mortgages, and other securities, entitling him to receive and collect for interest moneys upon the different sums of money so placed in his hands, the sum of about \$10,000. That the defendant returned to said Anthony Mason, of the sums so placed in his hands, and the interest moneys received thereon, the sum of \$6305, leaving in his hands, of said moneys, about the sum of \$11,695. That on or about the 6th day of July, 1867, the plaintiffs demanded of the defendant the balance of said moneys so remaining in his hands as aforesaid, and the notes, bonds and mortgages, or other securities received and held therefor, but that said defendant refused to pay or deliver over the same or any part thereof, and still refuses and neglects to pay the same or any part thereof. The plaintiffs therefore asked judgment against the defendant for the sum of \$11,695, with interest from July 6, 1867, besides costs.

The defendant, by his answer, denied each and every allegation contained in the complaint, and alleged that he had fully paid and satisfied all the claims mentioned in the complaint. For a further answer, he alleged that the said Anthony Mason, in his lifetime, was, and his estate still is, indebted to the defendant for money had and received to his use, for moneys paid, laid out and expended by the defendant, to and for the use of said intestate, for moneys over paid by the defendant to said intestate by mistake, and for work, labor and services done and performed by the defendant, during the years mentioned in the complaint, for the said intestate and at his request, in the sum of \$30,000. That all of said matters grew out

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of, and were connected with, the matters set forth in the complaint; and the defendant demanded judgment against the plaintiffs for the sum of \$15,000, and costs.

The plaintiffs put in a reply denying each and every allegation of the answer constituting a counter-claim.

On the trial, before the referee, the defendant was examined as a witness, and testified that he had examined among his father's papers, since his death, and found among them four letters, of different dates, from him (the witness) to his father, each containing a statement of the amount of funds contained therein, or remitted therewith. One of them also contained a statement, in detail, of the amounts previously sent. Being asked in whose handwriting they were, the testimony was objected to, on the ground that the witness was incompetent, under sec. 399 of the Code. The objection was overruled, and the plaintiffs excepted. The witness testified: "They are in mine. I took them in the presence of Stephen Barrett, the acting administrator of father's estate, and with his consent." Letters offered in evidence. Objected to by the plaintiffs on the ground, 1st. They are they the declarations of the defendant in his own favor. 2d. Incompetent under section 399 of the Code, and generally. Objections overruled and letters received; to which decision the plaintiffs excepted.

The referee found, as facts, that Anthony Mason died on the 11th day of April, 1864, leaving a last will and testament, which was duly admitted to probate in the surrogate court of the county of Orleans, and the plaintiffs duly appointed executors thereof, who thereupon duly qualified and entered upon the discharge of their duties as such. That the said Anthony Mason in his lifetime, and during the year 1850, to the year 1856, both inclusive, delivered to the defendant divers sums of money, amounting in the aggregate to the sum of \$7691, to invest for him in the State of Michigan. That the defendant

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had since that time paid to the said Anthony Mason the full amount of the moneys so delivered as aforesaid, together with the lawful interest thereon. And upon the facts so found, the referee found, as a conclusion of law, that the defendant was not indebted to the plaintiffs in any sum of money, whatever, by reason of any of the matters set forth in the complaint; and that the defendant was entitled to judgment against the plaintiffs, dismissing their complaint, with costs to be paid out of the estate of said Anthony Mason, deceased, in their hands; and judgment was directed accordingly.

H. E. Sickles, for the appellants.

I. The referee erred in overruling the plaintiffs' objections, and allowing the defendant to testify to the sending of the letters containing the statements, and the reception and retention thereof by Anthony Mason. The objection was that the witness was incompetent to testify in regard thereto, under section 399 of the Code. This section, at the time the action was tried, (December 23d, 1868,) read as follows: Provided, however, that no party to an action, &c., "shall be examined in regard to any transaction or communication between such witness and a person at the time of such examination deceased," &c. This section applied as well to written as to verbal communications, (*Graham v. Chrystal*, 37 How. 279,) and the evidence came clearly within the exception.

II. The referee erred in overruling the plaintiffs' objections, and in receiving in evidence the letters above referred to. They were the declarations of the defendant proven by him and offered in his own favor, and as such are incompetent. (*Decker v. Myers*, 31 How. 372. *Crounse v. Fitch*, 23 id. 350. *Crosbie v. Leary*, 6 Bosw. 312. *Weeks v. Lowerre*, 8 Barb. 530. *Erben v. Lorillard*, 19 N. Y. 299. *Moore v. Meacham*, 10 N. Y. 207.)

III. These erroneous rulings were not mere technical

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errors, and cannot be disregarded. Where evidence is improperly received, bearing upon material questions in the case, even if there were other competent and sufficient evidence, the error is not a technical one, merely, and cannot be disregarded, as the court cannot say the illegal evidence did not influence the decision. (*Williams v. Fitch*, 18 N. Y. 546, 552. *Erben v. Lorillard*, 19 id. 299. *Decker v. Myers*, 31 How. 372-375. *Worrall v. Parmelee*, 1 N. Y. 519.) It is only in a very clear case that an error in the court below, in admitting illegal testimony which may have influenced the decision, will be disregarded. (*Main v. Eagle*, 1 E. D. Smith, 619, 621. *Belden v. Nicolay*, 4 id. 14-16.) And where erroneous evidence is received under objection, the judgment must be reversed, unless it affirmatively appears that no injury could possibly have been caused. (*Wilson v. Wilson*, 4 Keyes, 413. *Battin v. Healey*, 36 How. 346.) Here the evidence was material, and tended to show payments which were disputed, and in regard to a portion of which there was no other testimony; and yet the decision shows the referee regarded them all as proven.

IV. The referee erred in his conclusions of law. He finds as facts, "that the plaintiffs' intestate delivered to the defendant divers sums of money, amounting to \$7691, to invest for him in the State of Michigan," and then, not that he had returned the same with the increase, but "that the defendant has since that time paid to said Anthony Mason the full amount of the moneys so delivered, together with the lawful interest thereon;" and then, as conclusions of law, he finds that the defendant is not indebted to the plaintiffs in any sum, and is entitled to judgment dismissing the complaint. Giving to the report a fair construction, its substance is this: the defendant received this money, as agent, to invest for the plaintiffs' intestate in the State of Michigan; that he was only bound to return the same with lawful interest, and having so done, he was not liable in this action. This interpretation

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is strengthened by the fact that the referee evidently so figured it as reckoning simple interest, at seven per cent, and allowing the defendant the payments he claims, the account stands nearly balanced. We submit such a finding is error; that the defendant was bound to return the amount placed in his hands, with the sums actually received by him for its use, and that his liability is not limited to lawful interest thereon. And this was his express agreement, as evidenced by his letters and receipts. Even if the sums collected for the loans were unlawfully received, as agent he was bound to pay them over, and could not make a defense that his principal was not lawfully entitled to the money. (*Crosbie v. Leary*, 6 Bosw. 312.) But by the law of Michigan it was not unlawful to collect and receive more than ten per cent; the excess over the rate fixed by the statute, only, is forfeited in case the borrower chooses to contest the payment on that ground; and there is no evidence or pretext that such a defense was ever made.

V. If, for the purpose of sustaining the conclusion of the referee, this court is asked to presume a finding that the defendant has paid over both the principal and the sums received as interest upon the moneys loaned by him as agent for the plaintiffs' intestate, we submit, 1st. That although the court, in order to sustain the decision of a referee, will presume that he found such facts, in addition to those stated in the findings, appearing in the case, as will sustain his conclusion; yet it can only be done when, upon examining the evidence, it will warrant such additional findings. (*Valentine v. Conner*, 40 N. Y. 248.) 2d. There is no evidence whatsoever in the case, which will sustain such a finding; and the facts, as found and stated in the report, are repugnant thereto. Laying aside all of the plaintiffs' evidence that is disputed by the defendant, and giving him the full benefit of all produced by him, the case shows these facts undisputed: that the

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defendant loaned the moneys placed in his hands, and the interest as collected, keeping them invested, save an average of \$1000 on hand, at a minimum rate of interest of ten per cent, and running from that to twenty-five and thirty per cent. He swears, in substance, that the moneys were kept invested, save an average of \$1000. In his letter dated November 25, 1852, acknowledging the receipt of the first large sum (\$1500) placed in his hands, he promises to loan it "for the term of from one to five years, interest annually and semi-annually;" and he says, "I will let it for ten per cent, and what more I can get." His subsequent letters show that he loaned the money; and they contain no intimation that he was obtaining less than ten per cent. All that is said upon the subject is in his letter of August 27, 1853, where he says "ten per cent is all I can get at present." He states that money was being loaned as high as fifteen per cent. He tells Matilda Mason that "he had let the money as high as twenty-five and thirty per cent." The defendant did not deny or dispute this testimony; neither did he attempt to show that he received less than the rate he promised to loan for; nor that he did not receive as high rates as he admitted he had received. We submit, then, that charging the defendant ten per cent compound interest on money received, allowing him the surplus of interest collected for his services; allowing also an average of \$1000 on hand, and deducting the interest at ten per cent upon that sum; also allowing \$500, the highest sum named by him, for disbursements, would be a most liberal computation, and certainly all that can with any propriety be claimed for the defendant. It clearly appears that the defendant has not refunded this amount, but that there remains a large sum, at least \$4000, in his hands. The referee does not find that he has so refunded, but simply that he has paid back the moneys received, with lawful interest thereon. This finding, we claim, negatives the idea of his having

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returned more than the amount of money received, with seven per cent simple interest thereon. And the evidence will not justify a finding that any more has been returned. The findings sought to be presumed, and the finding that the defendant is not indebted to the plaintiffs in any sum of money whatever, have therefore no evidence whatever to support them, and such findings could not be sustained in the Court of Appeals, (*Fellows v. Northrup*, 39 N. Y. 117; *Mason v. Lord*, 40 *id.* 476;) much less by the general term, whose right and duty it is to inquire whether the findings accord with the weight of evidence. (*McCabe v. Brayton*, 38 N. Y. 196. *Loeschick v. Baldwin*, *Id.* 326. *Valentine v. Conner*, 40 *id.* 248, 253.)

John H. White, for the respondent.

I. The exceptions of the plaintiffs, about which there can be any question, relate, almost exclusively, to the admission of evidence. The rule, under § 399 of the Code, should be, and probably is, the same as it was when the testimony was received under the act as amended in 1867. By that act a party could not be examined "in regard to any transaction or communication between such witness and a deceased person." The act, as amended in 1866, read: "In respect to any transaction or communication had personally by said party with a deceased person." Under this last act it has been decided, "that a party could testify that he deposited money in a bank and had it entered in the bank-book of deceased, and that the money was his own money;" and that it was not designed to exclude the testimony of a party as to an occurrence at which the other deceased party need not have been present, or a fact which he need not have known. (*Franklin v. Pinkney*, 18 *Abb.* 186.) The section now reads: "In regard to any personal transaction or communication between such witness," &c.; thus, if there was any difference in this respect, changing it back to where it was in

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1866. But it is insisted that there is no difference in the construction of this section in this particular as it stood in each of the three years; that a transaction or communication *between* two persons under this section means a personal transaction or communication. If this were not so, in all cases where contracts were made with agents, and the principal should die, the other party to the contract could not be a witness, but only the agent. Of the defendant's account, but two items are contested, viz., that of December 27, 1859, \$1000, and October 16, 1859, \$1000. In regard to the disputed item of \$1000, December 27, 1859, the testimony is uncontradicted. In addition to the undisputed testimony of other witnesses, the plaintiffs have seen fit to introduce the sworn statement of the defendant, and we claim the right to use that as evidence in our favor. Then we have the testimony of Moulthrop, that the intestate told him that he had drawn his money all away from Michigan; and of Swobe, that the intestate told him "Anthony had sent him all—all there was."

II. But, even if the rule were not as contended, the exceptions apply mainly, if not entirely, to admitted items, and could not, therefore, prejudice the plaintiffs. Every exception to the admission of testimony as contrary to section 399 of the Code, is in relation, either to undisputed items or to the two items which are undisputedly proven. There is, in fact, no conflict in the evidence as to any of the items of the defendant's account. These items are admitted merely in aid of the evidence of Moulthrop and Swobe as to the fact that the intestate had received all his money from Michigan, and not as the chief evidence.

III. The theory of the plaintiffs is, that the money was sent out to loan, and that they were entitled to the net proceeds of the money, over expenses and commissions. There is no satisfactory evidence as to how much interest was received, whether six or seven per cent; but figure

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it at either rate and they are more than paid. The intestate told Hibbard he was not receiving more than seven per cent. There are two reasons why the evidence is not entirely satisfactory; one is, that the defendant's books were burned with his store some years ago, and the other, that the intestate was an illiterate man and was not accustomed to write, even on his own business. On the other hand, the defendant did write both receipts and letters, which were carefully hoarded, and were produced in evidence, or such of them as the plaintiffs chose to introduce. The defendant labors under great disadvantages; he is not able to swear to the state of the accounts, by reason of section 399, and has no written evidence of even the admitted items, or scarcely any. For these reasons, the court should hesitate long before it reverses the findings of as truly able a referee as decided this case.

By the Court, JOHNSON, J. The letters of the defendant to the plaintiffs' intestate, which were received in evidence in the defendant's favor, against the plaintiffs' objection, could only be competent upon the ground that the intestate, by receiving and retaining the letters without objection or reply, had impliedly admitted the truth of the statements therein contained in regard to the amount of funds inclosed therein or therewith. In each of the four letters thus sent and received is a statement of the amount therewith, or therein, forwarded to the intestate, and in one of them is also a detailed statement of the several amounts sent prior to that date. It has long been well settled that when one party sends an account current to another, residing in a different place, and the party to whom it is sent keeps it by him for a length of time, without replying to the statement, or disputing its accuracy, he is deemed to acquiesce in its correctness, and to admit the truth of the statement. The cases on this subject will be found collected in *Cowen & Hill's Notes*, n. 191, pp. 194, 195. The

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maxim qui tacet consentire videtur applies. The silence of the party receiving, gives consent, and the statement is received, not so much as the declaration of the party making and sending it, in his own favor, as the admission of the other party of the truth of the statement. These letters, I think, fall within this principle. But in every such case, an essential element is the fact that there has been no denial or contradiction of the statement, in any manner. The presumption of the admission of the truth of the matter stated, is founded upon the fact that the party receiving it has omitted to deny or controvert it. This element is wholly wanting here, and the presumption of acquiescence or admission wholly fails. It is unnecessary, however, to decide this question, of the competency, or sufficiency, of this evidence when properly before the court.

In the present case the letters were proved by the testimony of an incompetent witness. The only evidence of their having been written by the defendant, to the intestate, or of their having been found amongst the papers of the latter, thus showing that he had received and retained them, was the testimony of the defendant himself. The objection was taken that the defendant was incompetent to testify on the subject, under section 399 of the Code, and exception to the ruling admitting the evidence duly taken. The testimony was clearly incompetent. It related to both a "transaction" and a "communication" between the party testifying, and a deceased person, whose claims against such party were the subject of the litigation. The provisions of section 399 of the Code relate as well to written as to verbal communications. It cannot be said that these letters, and written statements of the accounts between the defendant and the intestate, could have had no influence on the mind of the referee in deciding the issues tried before him. They touched the vital points at

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issue, and must be presumed to have had their legitimate influence.

The judgment must therefore be reversed and a new trial granted, with costs to abide the event.

[FOURTH DEPARTMENT, GENERAL TERM, at Rochester, September 5, 1870.
Mullin, P. J., and *Johnson* and *Talcott*, Justices.]

LESTER L. ROBINSON and others vs. EDWARD P. FLINT and others.

The defendants agreed to send to the plaintiffs, at San Francisco, "all the balance of the iron for said railroad, now lying in Boston or New York, amounting to about fifteen hundred tons, which said iron was originally purchased by C. L. W. from W. F. W. & Co., of Boston." *Held* that this language was simply descriptive, and did not constitute a warranty that the particular article existed. And that if the article was not at the places from which the defendants were to transport it, the omission to send it would be no breach on their part.

The very gist of the action for deceit is the fraudulent intent with which the representation is made; and that intent is not established by proof merely of the falsity of the representation; but knowledge, when it was made, by the party making it, that it was false, must be shown.

Where all the information possessed by the party making a representation was obtained from others, and there was nothing to show that he did not believe, or had not the right to believe, in the truthfulness of the information he had received; *Held* that no action would lie against him to recover damages for false representations.

THIS case comes before the court upon exceptions ordered to be heard in the first instance at the general term; the plaintiffs having been nonsuited at the trial. The suit is upon two separate claims or causes of action, both arising out of the same general transaction. The first claim is to recover damages for false representations, fraud and deceit, respecting certain railroad iron; the second claim is to recover damages of the defendants for not sending to the plaintiffs at San Francisco, certain rail-

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road iron purchased by the plaintiffs of the defendants, but sending instead, iron of an inferior character and quality. The plaintiffs alleged, in their complaint, that they, at the times thereafter specified, were copartners, trading and doing business under the firm name of Robinson, Seymour & Co. That the defendants, Edward P. Flint, James P. Flint, Alfred Peabody, and George H. Kellogg, at the times thereafter specified, were, and still are, copartners, trading and doing business under the firm name of Flint, Peabody & Co., at Boston, San Francisco, and elsewhere. That the defendants, William T. Gliddon, John A. Gliddon, and J. M. S. Williams, at the times thereafter specified, were, and still are, copartners, trading and doing business under the firm name of Gliddon & Williams, at Boston and elsewhere. That on or about March 10, 1854, Thompson & Forman, of London, by their agents, William F. Weld & Co., of Boston, made and entered into a certain contract or agreement with the Sacramento Valley Railroad Company, by their president and agent, Charles L. Wilson, for the sale and delivery to said railroad company of two thousand tons of railroad iron, the rails to be manufactured by said Thompson & Forman, or by manufacturers of equal celebrity, and to be of their best quality, to be made like two patterns then agreed upon and delivered, and the price thereof to be \$48 per ton of 2240 pounds, free on board in Wales, (in Great Britain,) and to be equal to cash at dates of the bills of lading given in Wales. The iron was to be shipped from Wales to California by the way of Boston, and W. F. Weld & Co. agreed to advance the money for the freight and insurance, the same to be repaid by the railroad company, with interest and commissions. In payment for the iron, the railroad company were to give their notes, payable six months after date of arrival of each shipment at San Francisco, with interest from date of each shipment at Wales, the notes to be secured by the indorsements of any number of the

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directors of the railroad company, or such other collateral security as might be required by said Flint, Peabody & Co., at San Francisco, who, together with said Gliddon & Williams, it was in said contract mentioned, guarantied the performance of this contract by the railroad company, for a commission to be paid them by said company, the notes to be paid at maturity, in sight bills on Boston, or an equivalent in cash, the company to pay all freight, duties and charges on the iron, which might accrue after leaving Wales. At the time of making the contract last mentioned, and on or about the 10th of March, 1854, the defendants Gliddon & Williams, and Flint, Peabody & Co., for a valuable consideration, made, executed and delivered to said William F. Weld & Co., agents of Thompson & Forman, a certain instrument in writing, whereby they guarantied the full performance on the part of said railroad company, of all and each of its stipulations in said above mentioned contract, and which was thereto annexed, to as full an extent as if said defendants were the sole purchasers of the said iron. On or about the 17th of March, 1854, and shortly after the execution and delivery of the contracts above mentioned, said defendants Gliddon & Williams, and Flint, Peabody & Co., jointly, of the one part, and said Charles L. Wilson, on behalf of himself and also as president and agent of said railroad company, of the other part, entered into an agreement, by which, after reciting and referring to the contracts above mentioned, it was agreed that Gliddon & Williams should receive the iron from W. F. Weld & Co., and ship it in vessels of their line to San Francisco, consigned to Flint, Peabody & Co., in certain quantities, and at a rate of freight therein specified. Three hundred to five hundred tons were to be shipped immediately, or as soon as furnished by Weld & Co., and the balance of the two thousand tons, when the defendants should have the individual responsibility of each one of the directors of the road for the performance

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of all Mr. Wilson's contracts respecting this lot of iron, or the names of so many directors as should be fully satisfactory to Flint, Peabody & Co. If Wilson failed to obtain this security, then Weld & Co., Gliddon & Williams, and Flint, Peabody & Co., were not under obligations to him to make further arrangements. The defendants, said firms, were to receive for their joint equal benefit, from Wilson and the railroad company, a commission of five per cent on the gross cost of the iron delivered in San Francisco, (exclusive of the cost of freight thence from Boston,) which was to be in full for their services as guarantors, &c. As a large part of this iron was to be received from England, (meaning Wales,) no definite period could be fixed for its shipment from Boston; but if possible it was all to be on the way from Boston to California by the 15th of June, 1854. Soon after the making of said contracts, and in pursuance thereof, the whole of said two thousand tons of iron was imported into the United States, and, under the last mentioned agreement, the defendants Gliddon & Williams, did, in or about the months of May, June and July, 1854, ship to San Francisco, consigned to the defendants Flint, Peabody & Co., about four hundred and ninety-one tons of said railroad iron, and the same arrived there at different dates, between the 9th of September and the 20th of November, 1854. On the 24th day of November, 1854, at said city of San Francisco, the plaintiffs made and entered into an agreement in writing, with said Sacramento Valley Railroad Company, whereby the plaintiffs agreed to construct and equip the entire road of said company within eighteen months thereafter, for the price or sum of \$1,800,000. And also therein agreed to assume the said contract made, for two thousand tons of iron rails, with William F. Weld & Co., of Boston, as agents of Thompson & Forman of London, dated March 10th, 1854; provided, however, that no reference should be had or no responsibility assumed upon said contract, unless it could

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be carried out as originally contemplated; and provided said Flint, Peabody & Co. would not require the individual indorsement of any member of the board of directors of said company on the notes to be given for the iron. Soon after making the last mentioned contract, and in January, 1855, the plaintiffs went to Boston for the purpose of ascertaining the market price of such railroad iron as is above mentioned, and whether the defendants were in a condition to carry out the aforesaid contract for the purchase of iron as originally contemplated, so that the plaintiffs would be bound by their said contract with the railroad company to take that particular iron, although the contract price and charges greatly exceeded the then market value of said iron in Boston; and the plaintiffs then ascertained that such iron as was agreed for in the original contract of purchase, could then be bought in Boston at the price of \$45 per ton of two thousand two hundred and forty pounds, free and clear of all charges except the duties payable to the government; whereas the iron, according to the original contract of purchase, was to be paid for at the rate of \$48 per ton, with the addition not only of duties but of freight, insurance and all other charges from the time of its shipment in Wales, making a difference between the contract price, with the charges on the iron and the market value of such iron in Boston, of about \$32 per ton of two thousand two hundred and forty pounds. The plaintiffs thereupon, in the same month of January, 1855, applied to the defendants Gliddon & Williams, and Flint, Peabody & Co., for the purpose of ascertaining whether the iron originally purchased by the railroad company was still on hand in Boston, and the defendants could carry out the contract for the purchase of iron as originally contemplated, so that the plaintiffs would be bound by their said contract with the railroad company to accept said iron under and in pursuance of the original contract of sale. The plaintiffs thereupon

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stated that they had made such contract as aforesaid with the railroad company, and were bound to carry out the original contract of purchase, provided the iron originally purchased and imported was still on hand in Boston, and the defendants could carry out the contract as originally contemplated, but not otherwise; and the plaintiffs also stated to the defendants that the plaintiffs were ready to carry out the original contract of purchase, provided the iron was still on hand, as aforesaid, and the defendants could carry out the contract of purchase as originally contemplated; and provided also that the defendants Flint, Peabody & Co. would not require the individual indorsement of any member of the board of directors of the railroad company on the notes to be given for the iron. Thereupon, the defendants Gliddon & Williams, and Flint, Peabody & Co., well knowing all and singular the premises aforesaid, and contriving and fraudulently intending to cheat and defraud the plaintiffs by inducing them to enter into the contract hereinafter mentioned, for the iron, at a price greatly exceeding its market value, falsely, fraudulently and deceitfully stated and represented to the plaintiffs that the identical iron imported under the original contract of purchase, was then on hand in Boston, piled up in warehouses, where it had been kept on storage from the time of its importation under the original contract of purchase; and that they, the defendants, were in condition to carry out the contract for the purchase of the iron as originally contemplated; whereas, in truth and in fact, as was then well known to the defendants, but was not known to the plaintiffs, the whole of the two thousand tons of iron, which had been imported under the original contract of purchase, except the four hundred and ninety-one tons which had been shipped to California as aforesaid, had been sold and disposed of to other parties, and no part of the same was then on hand in Boston or elsewhere, nor were the defendants in a condition to carry out the

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contract for the purchase of the iron as originally contemplated. The plaintiffs, thereupon confiding in said statements and representations made by the defendants, and believing the same to be true, and that they were consequently bound to assume and carry out the said original contract for the purchase of the iron, were induced to, and did enter into a contract with the defendants, bearing date the 15th day of January, 1855, whereby the plaintiffs, among other things, assumed the original contract of the railroad company for the purchase of the iron, and bound themselves to carry out the same, on the part of the railroad company, so far as related to the price to be paid for the iron, although such price greatly exceeded the then market value of such iron in Boston. At the time said last mentioned contract was proposed by the defendants, the plaintiffs required of the defendants that they should insert in it the words, or to the effect, "that they (the defendants) would deliver to them (the plaintiffs) the iron originally purchased by said Wilson from Weld & Co., agents of Thompson & Forman, of England," and gave to the defendants as a reason for such requirement, that if the iron so originally purchased by Wilson from Weld & Co. was not then on hand as alleged by the defendants, they, the plaintiffs, were relieved entirely from carrying out the said Wilson contract for the purchase of iron. And further, the plaintiffs then refused to make or execute any contract with the defendants respecting said iron, unless words to the effect above stated were inserted in it. Thereupon the defendants, contriving and fraudulently intending the more effectually to deceive and defraud the plaintiffs in the premises, consented and agreed that words to such effect should be inserted in said contract pursuant to such request; and accordingly the words "which said iron was originally purchased by C. L. Wilson from W. F. Weld & Co. of Boston," were inserted therein, before the same was executed by the parties thereto. That the plaintiffs,

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by means of the false, fraudulent and deceitful statements and representations made by the defendants as aforesaid, and the false, fraudulent and deceitful representations made by the words inserted in the contract, as above mentioned, were deceived and defrauded, and were induced to, and did enter into a contract for the payment, and have since paid a much larger sum of money than the iron was worth, and a much larger sum than they would have paid, or agreed to pay for the same, had they known the truth in relation to the matters concerning which such statements and representations were made. That the plaintiffs, after the making of said agreement of the 15th of January, 1855, proceeded to construct and equip said railroad in California. That as fast as iron rails arrived and were delivered to the plaintiffs by said defendants, they were piled up ready for use, and soon thereafter used in the construction of such road. That the iron thus delivered by the defendants to the plaintiffs at San Francisco aforesaid, and used in the construction of such railroad, was not the iron which had been imported under the original contract of purchase; was not manufactured by Thompson & Forman, or by manufacturers of equal celebrity, nor was it of their best quality; and was not the iron originally purchased by said C. L. Wilson, of W. F. Weld & Co. of Boston; but the same was of many different patterns, badly manufactured, and, besides, subsequently proved to be, and was of a very inferior quality, not worth exceeding \$35 per ton of two thousand two hundred and forty pounds, deliverable in Boston or New York in bond. That by reason of such iron rails being of different patterns, and of an inferior quality, and badly manufactured, and especially by reason of their not being or like unto the iron originally purchased by said C. L. Wilson, of W. F. Weld & Co. of Boston, the said railroad company claimed from these plaintiffs damages therefor to the amount of \$50,000, and refused to pay the plaintiffs the contract price for the con-

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struction of such road until after a suit brought, and until the plaintiffs paid and allowed said claim for damages, by permitting said company to deduct therefor said \$50,000 from such contract price. That at or about the time of the delivery by the defendants of said iron, as above stated, the plaintiffs paid said defendants Flint, Peabody & Co., for and on the joint account and benefit of the defendants, the said original contract price of \$48 per ton, deliverable in Wales, together with all freight, insurance and charges alleged by the defendants to have been paid or incurred by them under said contracts, and to be chargeable against said iron. That the whole amount so paid by the plaintiffs to said defendants for and on account of said iron, during the period between March, in the year 1855, and January, in the year 1857, was the sum of \$216,744.28, or thereabouts. That the defendants included in said sum as chargeable against said iron, various items for insurance, alleged to have been effected by them, upon said iron for the account and benefit of the plaintiffs, amounting in the whole to a sum exceeding \$6496; also various items for storage alleged to have been incurred and paid on said iron, amounting in the whole to about \$2000; whereas neither of said sums or items so charged against said iron, and paid by the plaintiffs, were paid or incurred by the defendants, or either of them, for or on account of the iron so originally purchased, nor were any or either of said sums or items chargeable against the iron, or against the plaintiffs; nor were the plaintiffs in any way liable to pay the same. That each and every of such false and fraudulent representations, and said fraudulent items and charges last referred to, had been discovered by the plaintiffs since they paid the defendants for and on account of the said iron so delivered; and each and all of said payments were made in ignorance of the fraud and deceit practiced in manner herein stated by the defendants upon the plaintiffs. That by reason of the false and fraudulent representations and statements so

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made by the defendants, and by reason of the fraud and deceit practiced by the defendants upon and towards the plaintiffs in manner set forth, and by reason of the several matters and things before stated and alleged, the plaintiffs had been injured and damaged to the sum of \$171,000, with interest thereon from the 1st day of October, in the year 1855; and which sum they claimed to have and recover from the defendants, in this action.

Second. The plaintiffs further stated, as a distinct and separate cause of action against the defendants, that the several matters above set forth and stated, down to and including the making of the contract between the plaintiffs and the defendants, are true; and that by said contract the defendants agreed, among other things, to send to San Francisco all the balance of the iron for said railroad, amounting to about one thousand five hundred tons, which was originally purchased by C. L. Wilson from W. F. Weld & Co. of Boston. That notwithstanding such agreement or contract, the defendants did not send to San Francisco, nor deliver to the plaintiffs, said balance of fifteen hundred tons of railroad iron which was originally purchased by C. L. Wilson from W. F. Weld & Co. of Boston; but, on the contrary, delivered to the plaintiffs at San Francisco, aforesaid, a very inferior quality and character of iron of different patterns, and which was not worth exceeding \$35 per ton of two thousand two hundred and forty pounds, deliverable in Boston aforesaid, in bond, which would be equal to an average cost of \$57 per ton delivered in San Francisco, with all the duties and charges paid thereon. That the iron rails so delivered by the defendants were immediately piled up for use, and soon thereafter used by the plaintiffs in the construction and completion of such railroad. That the quality of such rails could then be determined only by actual use and wear. That although such rails so delivered appeared to be not of the patterns originally purchased by said C. L.

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Wilson from W. F. Weld & Co., yet the plaintiffs were under the necessity of accepting and using the same, to enable them to construct said railroad within the time limited in their agreement, and also to prevent an incalculable loss, which would have resulted from permitting the roadway as then prepared, with machinery, rolling stock, &c., to wait until iron rails of a proper kind and quality could be purchased in and received from the Atlantic States. There being at that time no other railroad constructed, or in progress of construction, in said California, and no facilities or means of obtaining such iron rails in said State of California, or elsewhere on the Pacific coast. That such iron rails so delivered and used were not manufactured by Thompson & Forman, or by manufacturers of equal celebrity; nor were they of their best quality, and were not the iron originally purchased by said C. L. Wilson from W. F. Weld & Co. of Boston. But, on the contrary, the same were badly manufactured, of many different patterns, and, by subsequent use, proved to be, and actually were, of a very inferior quality, not worth exceeding \$35 per ton in bond, in Boston, as above stated. That by reason thereof, the said railroad company claimed from the plaintiffs damages arising therefrom to the amount of \$50,000, and refused to pay the plaintiffs the contract price for the construction of such road until after suit brought therefor, and until the plaintiffs paid and allowed said claim for damages, by permitting said company to deduct the damages thus claimed, viz., \$50,000, from such contract price. That the plaintiffs paid to the defendants for the said balance of iron thus delivered, viz., one thousand five hundred and eight tons, nineteen hundred weight, two quarters and twenty-three pounds, the sum of \$163,298, or thereabouts—the amount paid being equal to \$108.22 for each ton thus delivered in California, with duties and charges paid thereon. That the difference between the actual value of the iron thus

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delivered, and the actual amount thus paid by the plaintiffs to the defendants, in ignorance of the fact that the iron thus delivered was not the iron so originally purchased by C. L. Wilson of W. F. Weld & Co. of Boston, nor iron of equal quality, kind, or character, amounts to the sum of \$77,285. That such payments were made as cash on the 1st day of October, 1855, with interest after that date; and the plaintiffs therefore claimed that they were entitled to have and recover of and from the defendants the said sum of \$77,285, together with interest thereon from said 1st day of October, 1855. The plaintiffs therefore demanded judgment against the defendants for the sum of \$171,000, with interest thereon from the 1st day of October, 1855, besides costs.

The defendants, by their answer, denied the material allegations of the complaint.

On the trial, at the circuit, before Justice ALLEN, without a jury, in November, 1863, the agreement between the parties, of January 15, 1855, was introduced in evidence. It contained the following clause, among others: "1st. Messrs. Gliddon & Williams, and Flint, Peabody & Co., agree to send forthwith to San Francisco, all the balance of the iron for said railroad now laying in Boston or New York, amounting to about fifteen hundred tons, which said iron was originally purchased by C. L. Wilson, from W. F. Weld & Co. of Boston," &c.

When the plaintiffs rested, the defendants' counsel moved to dismiss the complaint, upon the following grounds: That the representation alleged to have been made by the defendants, as charged by the plaintiffs, that the iron imported under the original contract with Wilson was on hand in Boston, piled up in warehouses, if made, was of a matter wholly immaterial.

That the plaintiffs had not proven that the representation made was untrue.

That the plaintiffs have not shown, nor was there any

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evidence tending to show, that the defendants, if they made the representation, and if it were not literally true, knew, on the 15th of January, at the time that the alleged representation was made, that it was untrue.

That the plaintiffs, being put in communication with the responsible party, and the party who alone had knowledge, or could be presumed to have actual knowledge, had no right to rely upon the conversation of the defendants, who could know nothing but what Weld & Co. told them in relation to the matter.

That a more general proposition, which would be pertinent if this were an action upon the contract, was that the acceptance of the iron at the hands of these plaintiffs would discharge any obligation of the defendants.

Upon the decision of that motion by the court, the following opinion was delivered :

ALLEN, J. What I have to say will be very brief, and will necessarily be very desultory, from the want of time to examine the large number of papers and documents introduced in the case.

First. As to the decision of the case by the special term upon demurrer : (a) I will not say what effect the decision by Judge Ingraham then would have had upon the questions made, and heretofore ruled upon by me, had my attention been called to it at an earlier stage of this trial. Certainly I would have followed it, not only because such a decision thus made should be the law of the case until reversed, but also by reason of the deference due to the learned judge by whom the decision was made. But I do not regard that decision as controlling here, for the reason that the questions now made were not considered by the court on that occasion, as is apparent upon the face of the report itself. In regard to the sufficiency of the complaint as a complaint for fraud, the opinion is very brief,

(a) See 16 How. Pr. R. 240, S. C.

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and lays down general principles, which have not been controverted. I infer that the point was not raised upon which the principal discussion has taken place here, viz., as to the materiality of the representations and their bearing upon the parties and their relations. The principal point discussed, doubtless, was upon the misjoinder of the causes of action, viz., one in tort, and the other upon contract. Judge Ingraham discusses that question, and holds that both causes of action, assuming one to be in tort, and the other upon contract growing out of the same transaction, might be joined. I regarded both counts of the complaint as in tort, in the earlier stages of the trial, and they were so treated by the plaintiffs' counsel; but if this was wrong, I think the evidence excluded would have been excluded even if the second count had been regarded as upon contract. I have to some extent, in the discussion of other questions, given my views of the relations of the parties in this case, but not in relation to the construction of the contract upon which this iron was sold and delivered to the plaintiffs.

Second. As to the contract between Thompson & Forman, by Weld & Co. as agents, and the Sacramento Valley Railroad Company, which was carried out and executed by the delivery of the iron to the plaintiffs, who assumed that contract and took the iron, I do not regard this contract as having reference to any particular specific iron, or iron of any particular manufacture, then or thereafter to be made. My judgment is, that the contract would have been fulfilled by the delivery of any iron which conformed to the pattern, and which had been or should thereafter be manufactured either by Thompson & Forman, or by any other manufacturer of equal celebrity. The contract, in its specifications, had reference rather to the quality and kind of iron than to the particular manufacture, and Weld & Co., as the agents of Thompson & Forman, might have

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performed this contract by delivering any iron conforming in quality and size to that called for. They might have delivered it within the time limited by the contract, or before they were put in default. The iron was to be delivered, or ready for delivery, (except 500 tons to be delivered at Boston,) in Wales by a certain time specified, and when put on board ship in Wales, it remained the property of Thompson & Forman, and went forward to California as their property. It was understood that the iron was to be shipped to California via Boston, to be insured from Wales to Boston, and from Boston to California; the insurance to be paid by Weld & Co.; the charges for insurance, as well as other charges, were to be refunded by the railroad company on the arrival of the iron at California. There was to be no delivery under the contract to the railroad company, until those payments were made, and upon the failure to perform by the railroad company, it was optional with the sellers whether they would proceed with the contract or not. The railroad company were in default for not paying for the 491 tons already in California. The defendants were the guarantors for the railroad company, and were to be the carriers of the iron from Boston to San Francisco, and they were to collect the charges and receive the securities from the railroad company for the iron, and remit the same to Weld & Co. at Boston. To some extent they were the agents of both parties in receiving and remitting the charges and pay for the iron to Weld & Co. Now, at the time of these alleged misrepresentations, the plaintiffs had become the contractors with the Sacramento Valley Railroad Company, to build the road, and had agreed with that company to assume this contract for iron, the contract with the defendants for the carriage of the iron, and for other duties to be performed by them, and certain other contracts for locomotives, cars, &c., with other persons, subject only to the proviso, that the other parties to these

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several contracts were in a situation to perform them as originally contemplated. The object of that arrangement is very evident. The Sacramento Railroad Co., although they had been unfortunate, and were perhaps insolvent, were, nevertheless, legally liable upon this contract, and the defendants were under liability as their sureties, and their desire was to rid themselves of that responsibility, and to induce the contractors for the road to take the contracts off their hands, take their place and assume their liabilities under them. Therefore, the only condition annexed to the plaintiffs' agreement to assume them was that the parties to these contracts should be in a condition to perform on their part, for only in that case could they compel a performance by the railroad company, or charge them for non-performance. Mr. Robinson says, with this liability resting upon the plaintiffs, under the agreement to assume the contract, not only with the defendants here, but with Weld & Co., representing Thompson & Forman in these contracts, he came to Boston to ascertain whether the parties were in a situation to perform. Thompson & Forman were not then in default for not furnishing iron either in Wales or in Boston. The default, so far, was upon the railroad company; but the contract remained in force, provided Thompson & Forman so chose; it was entirely optional with them, whether by the failure of the railroad company they should declare the contract void, and treat it as rescinded, and abandon it, or tender all the iron, and insist upon the performance by the company and their guarantors. They had a right to call upon the railroad company to receive the iron, and pay for it according to the contract, and if they were in a situation to perform it by furnishing iron they had imported or shipped from Wales for that purpose, they could do so, or they could perform by furnishing other iron of the same quality, and same manufacture, conformably to the patterns which had been furnished

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them. The plaintiffs were not at liberty to repudiate the contract, whether any particular and specific iron was on hand or not. Thus situated, Robinson called upon the defendants to inquire in respect to this contract, and they learned then that the defendants were guarantors of the railroad company, and therefore subject to the same liability which rested upon the company; liable, if Weld & Co. or Thompson & Forman insisted upon the performance of the contract, either to take the iron themselves, pay for it, or respond in damages. Robinson inquired of the defendants about the iron contract, and the charge is, that the defendants said the iron was on hand. If I am right in respect to what I have said, it was not material whether the particular iron imported from Wales was on hand, or not. The question upon which the plaintiffs' liability to assume the contract rested, was whether Weld & Co. or Thompson & Forman were in a situation to perform the contract. If they were, then the liability was upon the plaintiffs to carry out the contract, and it did not require a new engagement on their part or create an obligation to do so, to receive the iron and pay for it. There is no allegation in the complaint that the defendants were not in a situation to perform their contracts, or that the plaintiffs were not bound by their contract with the railroad company, to assume and perform this iron contract.

Third. If reference was made to the contract with Weld & Co., there is no claim that the defendants were not in a position to carry out and perform their guaranty, and also their contract with the railroad company. These were the only contracts they had made, or which they could be called upon to perform. They had no other connection with the iron. Then, whether the particular iron was on hand was not material. The real question was whether Weld & Co. were in a situation to perform their contract; in such a situation that they could have compelled the railroad company to have received the iron of them. If so,

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then the plaintiffs were bound to take it. There is certainly no evidence that they were not in such a situation, and no claim that such a representation would have been untrue. Whether they had a particular shipment, a particular invoice of iron piled up in warehouses in Boston, was not at all material, because it did not go to the question of their situation and ability to perform their contract. Reference has been made to the invoice of certain iron which was shipped from Wales to Weld & Co. for account of the railroad company. Who were the legal consignees of that iron, is not very material. Very likely in some sense the railroad company may be regarded as the consignee, under the bill of lading. If the plaintiffs' counsel be right, that the iron did go forward as the iron of the railroad company, and was in truth their iron, then certainly their claim would be against Weld & Co. for a wrongful disposal of it, and not against the defendants upon their representation. But the iron was not the iron of the railroad company, and was not so appropriated as to give the plaintiffs or the railroad company the right to insist upon this specific iron, and reject all other. Reference has also been made to the first clause in the contract between Gliddon & Williams, and Flint, Peabody & Co., and Robinson, Seymour & Co.

"1st. Messrs. Gliddon & Williams, and Flint, Peabody & Co. agree to send forthwith to San Francisco, all the balance of the iron for said railroad now laying in Boston or New York, amounting to about 1500 tons, which said iron was originally purchased by C. L. Wilson from W. F. Weld & Co., of Boston."

I do not regard that either as a representation or warranty that there was any such iron on hand, or any agreement to carry any particular iron designated and separated from all other iron. It is rather a description of what particular iron was to be sent, the source from which it was to come, restricting it to iron which was furnished, or to

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be furnished, under the contract of Weld & Co. with the railroad company. Reference has been made to the freight, insurance, etc., upon the iron delivered to Robinson, Seymour & Co., and charged in the account rendered by Flint, Peabody & Co., which is in evidence, together with another statement, which is the account of Weld & Co., referred to in it. Take these two accounts together, and they show that the property went forward, not as the property of Flint, Peabody & Co., and not as shipped by them, but as shipped by Weld & Co., going forward as their property. The charges were made against the iron by Weld & Co., and not by Flint, Peabody & Co., and are so represented in the account rendered. Whether these accounts were right or not, the defendants were not at all responsible for any errors or overcharges. That is a matter between Robinson, Seymour & Co. and Weld & Co. If Weld & Co. rendered incorrect charges, and charged for freight which they had not in fact paid; if they charged payments which they could not have made, that is a matter to be settled between the plaintiffs and Weld & Co. The payment was but a settlement between Robinson, Seymour & Co. and Weld & Co., through Flint, Peabody & Co., at San Francisco. Flint, Peabody & Co. did not assume any new relation to the parties, or change their position in any respect by this new contract which they made with the plaintiffs in January, 1855. They still retained the same position, carrying the iron for Weld & Co., subject to such charges as Weld & Co. chose to impose upon it, collecting those charges, and remitting them according to the original contract. If there was any wrong done here, it was done by Weld & Co.; and then I might remark, in this connection, that the accounts were settled by Robinson, Seymour & Co. without any objection; that all the items were paid, and they must have known that the iron which they were receiving was not the same iron upon which freight was charged from Wales. For in-

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stance, the freight, as charged in this account of Robinson, Seymour & Co., is for iron shipped from Wales to Boston, whereas the contract provides that a certain part of it shall be shipped from New York, and a great part of it was actually shipped from New York; so it could not have been the same iron upon which freight was charged. They practically treated it as a contract for furnishing any iron which answered the description of the contract, rather than for a particular or specific iron which had been imported. In any view of the case, the plaintiffs' legal liability and legal duties were not changed by the contract they made with the defendants, so far as the contract with Weld & Co. is concerned; and whether they were induced to make the contract with the defendants by the representations alleged, is not material. In any aspect, the questions were not material to the matter in hand between the parties. It is suggested here that there may have been a mistake as to the legal rights of the parties; and the position taken by the counsel for the plaintiffs is, that we must treat the matter as if the parties' rights were as they supposed them to be—that is, if the plaintiffs were induced to do what they were bound to do, irrespective of the representations, because of the representations, that the defendants were nevertheless responsible if the plaintiffs mistook their duties and liabilities. I do not so regard it. I think we must ascertain their legal position, and see whether the plaintiffs were and could have been induced by these representations to change their legal position and legal responsibilities; and it is evident that their legal position was not changed by the new contract. I do not think the action can be maintained, and I will therefore grant a nonsuit.

The court thereupon decided to order a nonsuit, and ordered it accordingly; to which decision and order the plaintiffs duly excepted.

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David Dudley Field, for the plaintiffs.

I. According to the contract made March 10, 1854, the iron was to be manufactured by Thompson & Forman, or by manufacturers of equal celebrity, and to be of their best quality, to be like two patterns agreed upon, to be of a specified length, and to be ready for delivery, five hundred tons in Boston by May 15, seven hundred and fifty in Wales by June 1, and the rest by June 15. Let it be recollected, that the iron thus contracted for had been manufactured, had been delivered in Wales, had been brought to Boston, and there, instead of being kept for the railway, had been sold and dispersed. This was the condition of things when Mr. Robinson made his appearance and instituted his inquiries. His object was explained. He thought it possible that the iron might have been disposed of to others, and for that reason inquired. He was assured that the iron was still on hand, and the defendants in a condition to carry out the contract as originally contemplated. It is evident that both parties then understood that if the iron, which had been imported for the railway, had been sold to others, the defendants were not in a condition to carry out the contract as originally contemplated. Were they both mistaken; so that although one intended to deceive the other, and did deceive him, and by the deception induced him first to sign a new contract, and afterwards to take the iron sent forward under it, yet the deceiver incurred no responsibility? In other words, were the plaintiffs, before the deception, compellable to do all they did afterwards, under the influence of the deception? In answering this question, we should, in the first place, look beyond the strict legal rights of the parties to the contract between the railway company on one side, and the defendants with Weld & Co. on the other. The present plaintiffs were not parties to that contract, nor affected by it in any way, except as they chose to become so, by their own contract with the railway com-

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pany; and when they did so, they made their own terms. One of these terms was, that they should not be bound to take upon themselves the contracts of the company with the defendants and Weld & Co., unless these contracts could be carried out as originally contemplated. The first question therefore is, whether it was or was not contemplated that the iron should be ready for delivery in Wales during June. Most clearly that was contemplated. But when delivered in Wales, it was to be brought directly to Boston by Weld & Co., and there taken by the defendants in this case, Gliddon & Williams, and Flint, Peabody & Co., for transportation to San Francisco. That was as much contemplated as the delivery in Wales. Was it contemplated that the iron thus delivered in Wales and brought to Boston might be sold there, and other iron substituted? Surely that could not have been contemplated. And if not, then the sale of the iron which had been imported put it out of the power both of the defendants and of Weld & Co. to carry out the contract as originally contemplated. So much as to what was contemplated, without considering what might possibly be the strict legal rights of the original parties.

But, in the second place, if we regard only these strict legal rights, the sale of the iron by Weld & Co. or the defendants either terminated the contract between them and the railway company, or, at the very least, left the latter at liberty to decline the receipt of other iron of a different description and inferior quality. 1. When the one thousand five hundred tons of iron were delivered by Thompson & Forman on board ship in Wales, they became the property of the railway company, subject to whatever lien may have remained, for the price and charges of transportation. It was shipped "for account of the Sacramento Valley Railroad Company." The judge ruled, indeed, that the iron went forward, even to California, as the property of Thompson & Forman. In that, however,

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we submit, that he was mistaken. If it had been lost on its way to California, or to Boston, the loss would have fallen on the company. Such is the legal result of the three contracts; two of March 10, and the other of March 17, 1854. When the iron was once on board ship in Wales, nothing further was to be done by Thompson & Forman. The delivery was to be in Wales. To whom? To the masters of such vessels as might be provided by the company. Weld & Co. from that moment ceased to act exclusively as the agents of Thompson & Forman. They remained such agents, perhaps, so far as to retain any lien they may have had for the price, but they became the agents of the company "to advance the money to pay the freight from Wales to Boston." If they were to bring forward the iron as the property of their principals, their agreement to advance the freight for the company would have been superfluous. The company was to "take all risk and responsibility of procuring vessels to transport said iron from Wales to Boston, and from Boston to San Francisco." Gliddon & Williams were to ship the iron from Boston to San Francisco in vessels of their line, to the consignment of Flint, Peabody & Co. for the company. And in the new agreement of January 15, 1855, between the defendants and the plaintiffs, it was expressly stipulated that the property was to be considered at the risk of the plaintiffs before its actual receipt by them.

When things sold are identified, and the seller has done all that he has to do about them, the property passes, though there has been no actual delivery. (*Wooster v. Sherwood*, 25 N. Y. 278. *Fry v. Lucas*, 29 Penn. 356. *Hazall v. Willis*, 15 Gratt. 434. *Tompkins v. Dudley*, 25 N. Y. 272. *Waldron v. Romaine*, 22 *id.* 368.) In the case last cited, goods were sold in bond for export to Canada, the seller undertaking to obtain the necessary permit. They were placed on a vessel selected by the buyer, and were destroyed while detained for the permit.

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It was held that the title had passed and the loss was the buyer's. (2 *Kent's Com.* 492, and cases there cited.) The iron being thus the property of the company, the sale of it by Weld & Co., or Gliddon & Williams, or Flint, Peabody & Co., whichever did it, was wrongful, and extinguished the obligation of the company to pay for it, and the right of the others to demand payment for that or other iron. 2. If, however, the property in the iron did not pass to the company upon its delivery on board ship in Wales, but still continued in Thompson & Forman, its sale by Weld & Co., or by the defendants in this case, put it out of their power to carry out the contract as originally contemplated, for the following reasons: (a.) It was originally contemplated that a specific quantity of iron should be shipped from Wales by June 15, 1854. This iron had been shipped for account of the railroad company of which Wilson was president, but had been sold by Weld & Co. to other parties. By this act Weld & Co. put it out of their power and the power of the defendants in this case to fulfill the contract as originally contemplated. They had disposed of all the iron ever shipped to them before June 15, 1854, and of the precise iron which had been delivered by Thompson & Forman under the Wilson contract. By thus disposing of the thing sold, without the consent of the buyers, they elected to rescind the contract. (b.) If the iron imported prior to June, 1854, was not imported for the railroad company, then Weld & Co. were in default, and the company were at liberty, whenever they discovered the fact, to treat the contract as rescinded. (*Hoare v. Rennie*, 5 *Hurlst.* § N. 19. *Miller v. Phillips*, 31 *Penn.* 218.) (c.) Even if, as the judge assumed, both parties to the contract were in fault, the long delay was strong evidence of an abandonment thereof on both sides. (*Lawrence v. Knowles*, 5 *Bing. N. C.* 399. *Harris v. Bradley*, 9 *Ind.* 166.) (d.) The contract having been rescinded by the act or delay of Weld & Co., with-

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out the knowledge of the plaintiffs, the agreement of the latter to assume this contract, it being then not in existence, was of no effect. The railroad company was also ignorant of the acts of Weld & Co. in rescission of the Wilson contract, and therefore the recognition of that contract, in the agreement between the plaintiffs and the company, could not revive that extinct contract. A ratification is not binding unless made with a full knowledge of the facts affecting the transaction. (*Seymour v. Wyckoff*, 10 N. Y. 213, 224. *Cobb v. Dows*, Id. 341. *Nixon v. Palmer*, 8 id. 398. *Brass v. Worth*, 40 Barb. 648. *Pratt v. Philbrook*, 41 Maine, 132. *Freeman v. Bosher*, 13 Q. B. 780. *Owings v. Hull*, 9 Peters, 607.) (e.) But if we should concede that the Wilson contract was in force, and that the railroad company had waived the delay up to the time of its contract with the plaintiffs, yet, in January, 1855, they were entitled to demand an *immediate* performance, and to rescind, if this demand was not complied with. (*Benson v. Lamb*, 9 Beav. 502. *Frost v. Clarkson*, 7 Cowen, 28. *Morange v. Morris*, 34 Barb. 311.) The plaintiffs had, of course, the same right. But the defendants, by their misrepresentations, induced the plaintiffs to forego this right, and to accept a pretended performance by installments, when, if the plaintiffs had not been thus deceived, they could have compelled Weld & Co. to give up the contract. (f.) The contract between the plaintiffs and the railroad company should be construed as strictly against the claims of Weld & Co., and the present defendants, and as favorably for the plaintiffs, as if they were sureties. They were entitled to a strict and prompt performance on the part of Weld & Co. and the defendants. (*Wilson v. Roberts*, 5 Bosw. 100.) This, Weld & Co., and the defendants, could not render, and the plaintiffs were therefore exonerated. (g.) The contract between Wilson on one side, and Weld & Co. and the defendants on the other, not being unilateral, and exclusively for the benefit of the latter, their

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consent to the plaintiffs' assumption thereof was not to be presumed, but only to be inferred from positive action. Until such action was taken, the plaintiffs' contract might have been rescinded by the mutual consent of the plaintiffs and the railroad company. Of this opportunity to rescind, the plaintiffs were deprived by the deception of the defendants.

II. It was not necessary to prove that the defendants knew their representations to be untrue. 1. It was enough for the plaintiffs to show that the defendants' representations were untrue. The burden of proof was then placed upon the defendants to show that they believed their statements to be true. 2. Even if the defendants did not know their statements to be false, yet as they made these statements *positively*, without knowing or having good reason to believe them to be true, the defendants are liable. (*Bennett v. Judson*, 21 N. Y. 238. *Craig v. Ward*, 36 Barb. 377. *Atwood v. Wright*, 29 Ala. 346.) If the foregoing points are well taken, the nonsuit was an error and should be set aside.

III. Whether the inability of the defendants to fulfill the original contract had or had not been previously shown, it is certain that upon the court's expressing its opinion that it had not been shown, the plaintiffs made a formal offer to supply the proof. This was refused. The refusal was not put upon the ground that the offer was too late. It appears to have been because the offer united Weld & Co. with the defendants. Now, it is quite true that the complaint did not allege either that the representations related to the ability of Weld & Co. to fulfill, or that they were in fact unable to fulfill, but that was strictly not necessary, since the inability of Weld & Co. was the inability of the defendants. Although the complaint only alleged that the defendants were not in a condition to carry out the contract, yet it is clear that this was meant to include Weld & Co. The defendants had agreed to

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transport certain iron, to be delivered by Weld & Co. If Weld & Co. could not deliver it, clearly the defendants could not transport it, since they had no authority to buy it, nor to take it from any one except Weld & Co. How could the defendants be in a condition to carry out the contract, if Weld & Co. were not? But the offer was to prove the "inability of the defendants in the case, and Weld & Co. together, to carry out the conjoined contract." The contract was conjoined. The defendants had made themselves parties to the first contract between the company and Weld & Co. The inability of the defendants to carry out this contract was the very point in dispute. To reject the offer because, in making it good, the plaintiffs would have proved something more, that is, would have proved that Weld & Co. also were unable to fulfill, does not appear to be legal or reasonable.

IV. The court erred in excluding the evidence offered to show the bad quality of the iron shipped to California by the defendants. The evidence was competent for several purposes: 1. As tending to show that the iron sent to California was not imported under the Wilson contract. Of this, if it was not conclusive evidence, it was certainly, in connection with all the other circumstances of the case, partial evidence. 2. The evidence was proper, as bearing upon the amount of damages. Upon this it was indispensable. 3. It was proper, as proving the allegations of the second claim. One of the allegations therein was, that the defendants had not sent to California the iron imported under the original contract, but inferior iron; surely it was competent to make this proof, if the second claim was good for anything.

V. Coming now to the second cause of action, the plaintiffs submit, that the court erred in granting a nonsuit as to that. This claim is upon contract. It avers that the defendants, by their contract with the plaintiffs, of January 15, 1855, "agreed, among other things, to send to San

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Francisco all the balance of the iron for said railroad, amounting to about 1500 tons, which were originally purchased by C. L. Wilson from W. F. Weld & Co. of Boston;" and "that notwithstanding such agreement or contract, the defendants did not send to San Francisco nor deliver to the plaintiffs said balance of 1500 tons of railroad iron, which was originally purchased by C. L. Wilson from W. F. Weld & Co. of Boston, but, on the contrary, delivered to the plaintiffs at San Francisco, aforesaid, a very inferior quality and character of iron of different patterns," &c., and such iron rails "were not manufactured by Thompson & Forman, or by manufacturers of equal celebrity, nor were they of their best quality, and were not the iron originally purchased by said C. L. Wilson from W. F. Weld & Co. of Boston." The contract was proved, and it was also proved that the defendants did not send to San Francisco, or deliver to the plaintiffs all or any balance of the iron for the railroad originally purchased by C. L. Wilson from Weld & Co., of Boston. In place of sending the iron admitted by them to be on hand, they sent other iron, of an inferior quality, by means of which the plaintiffs sustained a loss of at least \$50,000. Why, then, should not the plaintiffs recover? We are told, indeed, that there was no balance of iron on hand to be sent, and no representation or warranty that there was. But is this a just view of the contract, or of the evidence? Are not the defendants in this double predicament? 1. They assured the plaintiffs, orally, that the 1500 tons were on hand. By that means they induced them to enter into the second contract. They are estopped, therefore, from now asserting the contrary. The case against them, in that view, is this: they admitted that the iron was on hand, and agreed to transport it. They have not transported it, and for not doing so are responsible. This is true, whether the written paper (the second contract) contains a representation or not. 2. This paper does contain

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a representation, or agreement, that there was such a balance on hand. The reasoning of the learned judge is thus stated, repeating the words of the contract. He says: "I do not regard that either as a representation or warranty that there was any such iron on hand, or any agreement to carry any particular iron designated and separated from all other iron. It is rather a description of what particular iron was to be sent, the source from which it was to come, restricting it to iron which was furnished or to be furnished, under the contract of Weld & Co. with the railroad company." But is not this an error? An agreement is to be interpreted as the party making it supposed the other understood it. Can there be any doubt, that the plaintiffs understood this to mean, that there were so many tons on hand of the iron originally imported, and that the defendants undertook to transport that to San Francisco? See how otherwise the defendants may escape all responsibility whatever. They may escape from the consequences of the misrepresentation, if, as the court says, it was immaterial; and they may escape from the consequences of the contract, if, as the court says, there was no misrepresentation? The construction which the judge gave to the stipulation adds to it, in effect, the words, "if there is any," so as to read: Messrs. Gliddon & Williams, and Flint, Peabody & Co., "agree to send forthwith to San Francisco all the balance of the iron for said railroad now lying in Boston or New York, amounting to about 1500 tons, if there is any." Let us imagine that it had been proposed at the time to insert such words. Either the person proposing to do so would have been laughed at as a fool, or denounced as a knave. Will it be said, however, as it was said at the trial, that the plaintiffs received the iron, and that debars them from recovering damages for non-fulfillment of the contract? If so, we answer: 1. That regarding the statement about the iron being on hand, and origin-

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ally imported under the contract, as a warranty, (which it really was,) the rule is well established, that the acceptance of an article, and paying for it, does not preclude the purchaser from afterwards recovering from the seller damages for breach of the warranty. (*Pateshall v. Tranter*, 3 *Ad. & El.* 103. *Coventry v. McNery*, 13 *Irish C. L.* 160-163.) 2. That if the statement was not a warranty, still the purchaser is not precluded from claiming damages, unless he had notice of all the defects of the article, and was in a situation to reject it, without serious loss or inconvenience. The rule is one of acquiescence or waiver. (*Sedg. on Dam.* 287, 3d ed. 1 *Pars. on Cont.* 592, 5th ed. *Voorhees v. Earl*, 2 *Hill*, 288. *Shields v. Pettee*, 2 *Sandf.* 262. *Fitch v. Carpenter*, 43 *Barb.* 40. *Reed v. Randall*, 29 *N. Y.* 358.) Suppose the Atlantic cable had been manufactured by two establishments, and the first portion used had proved good, but the other had been found in mid-ocean to be defective, is it the rule of law, that if the company did not forthwith turn back and tender the bad portion to the manufacturers, it was bound by its acquiescence to pay the full price for the inferior thing? In the present case, the plaintiffs could not foresee the principal defects till the iron was used; and if they had foreseen them, they were in a situation in which they could not return the iron, or refrain from putting it down. That it did not satisfy the contract, was known beforehand to the defendants, and not to the plaintiffs. One of the defendants was a director of the railway company; and, as such, claimed damages of the plaintiffs for not furnishing the stipulated iron. It is not conceivable that, under such circumstances, the plaintiffs are precluded from claiming that the defendants shall make good to them the loss which they have sustained by what was, on the part of the defendants, equally a breach of faith and a breach of contract.

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C. O'Connor, for the defendants.

I. Neither by their original agreement with the railroad company, dated March 17, 1854, nor by their subsequent agreement with the plaintiffs, dated January 15, 1855, did the defendants warrant to the purchasers the quality of the iron, or anything concerning it. 1. The iron was purchased by the company from Wm. F. Weld & Co. The defendants were not the sellers. On the contrary, they were the agents of the purchasers, and sureties for them to the sellers. Their duty was merely to receive such iron as Wm. F. Weld & Co. should produce to them for transportation, forward it to San Francisco, and there conduct the business of the purchasers in respect to it. 2. The reference to the balance of the iron, in the first clause of the agreement between the defendants and the plaintiffs, dated January 15, 1855, is not an undertaking or warranty by the defendants that there was then "lying in Boston or New York" specific iron which "was originally purchased by C. L. Wilson from W. F. Weld & Co." (a.) If those descriptive or demonstrative words could be regarded as a representation, undertaking or warranty of any fact in regard to said iron, it could only be an undertaking, by and on the part of the employers, Robinson, Seymour & Co., with their agents and carriers, the defendants, that there was a lot of iron, substantially as described, which they, the defendants, were to have the job of carrying. (b.) In fact, these words are a mere indication to the carriers, of the things to be carried.

II. Even if Weld & Co. were under no obligation to set apart, in Wales, certain particular rails, to keep the same scrupulously separate from all other rails, and to deliver the same identical rails to the purchasers, there is just enough in the contract of Weld & Co. to excite such a conceit in the mind of a litigious person who was wholly unacquainted with maritime commerce; but its provisions, taken together, forbid such a construction. 1. The deliv-

ery by Weld & Co. was to be in San Francisco, "within reach of the ships' tackles." The railroad company was to pay for the iron only "in notes payable in six months from the arrival of each shipment of iron at San Francisco." The "freights and other charges" were also to be paid only "on its arrival at San Francisco." So it will be seen that not only did the sellers take upon themselves the duty of safe delivery at San Francisco, and the risk of non-delivery from the perils of the sea, but they explicitly renounced all claim to payment for the iron, or to reimbursement for the charges, including freights, premiums of insurance, &c., unless there was an actual arrival of the iron "at San Francisco." As to the necessity of an actual delivery by Weld & Co. at San Francisco, the contract is most precise and definite in all its aspects. When the word "delivery" is employed in connection with Wales or Boston, the language is always "ready for delivery." 2. The references to Wales and Boston, in connection with the word "delivery," related exclusively to *time*. The object was to accelerate action by Weld & Co. The delivery alluded to in these instances was not a delivery to the purchasers, but a delivery on shipboard. Weld & Co. did not bind themselves to deliver on shipboard by the times named, but only to be *ready* for such a delivery. The reason for this is apparent. Freight vessels cannot always be procured, and it was provided that the company should "take all risk and responsibility of *procuring* vessels to transport said iron from Wales to Boston, and from Boston to San Francisco." This was to prevent any charge of delinquency against the sellers, in case of an unavoidable delay in procuring transportation. 3. Although the company was ultimately to pay all freight and charges, from the loading on shipboard at the "first port of shipment in Wales," including premiums of insurance, yet Weld & Co. were to advance all these charges, and were "to be repaid" only "on arrival of the iron at San Fran-

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cisco." Quite in keeping with all this, is the absence of any stipulation giving the purchasers an interest in the policies of insurance, or a right to recover thereon in case of loss. That was to be the sellers' resort for indemnity, in case a peril of the sea should prevent them from making delivery at San Francisco. 4. All these complex provisions grew out of the fact that there was no market price for such iron, in this country. Although the purchaser buys the article deliverable here, he is obliged to pay the price ruling at the time in the foreign market, with interest from shipment *there*, and the whole cost of delivery added thereto. Accordingly, the price agreed upon in this contract was \$48 per ton "free on board in Wales."

5. A particular kind of rails was not contemplated by the contract. They were only to be "like" the "patterns agreed upon." They were not required to be of Thompson & Forman's manufacture. If from "manufacturers of equal celebrity," it would suffice, provided they were of their (*i. e.* such *other* manufacturers') best quality."

6. Freights, insurance, and the ordinary shipping charges during the same period, in the same trade and on the same commodity, are so nearly alike that the price being made up of these cannot reasonably impress upon this contract the *identical-rail-notion* of the plaintiffs. If a shipment intended for a purchaser who failed, should reach Boston, whilst a shipment made to supply these purchasers was lost on the voyage, the sellers would not be excused for declining to deliver the former. The mere intentions or mental emotions of the manufacturer should not govern; in many cases it might be impossible to prove them.

7. The original agreement was dated March 10, 1854. It provided that 400 to 500 tons should be ready for delivery in Boston within fifty days. Surely Weld & Co. did not undertake, at that season, to send to Wales and get a load of iron shipped thence, and in Boston, within fifty days. And, besides, the contract between the defendants and the

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railroad company, made March 17, 1854, contains two distinct statements that part of the purchased iron was then in Boston. It says, "the balance of the order, that part of it which *is to come* from England." Again, "it is understood that as *a large part* of this railroad iron is to be received from England, no definite period can be fixed for its shipment from Boston." Now the necessity of computing charges, &c. from the time of the first shipment in Wales, applied as fully to whatever amount Weld & Co. had ready in Boston at the date of the contract, as to that which was thereafter to be imported. This circumstance is, alone, sufficient to repel any faint argument in favor the identical-rail-notion that could be deduced from the reference to charges. 8. The agreement made by these plaintiffs with the defendants, January 15, 1855, is conclusive evidence that the plaintiffs themselves did not consider this contract of the company with Weld & Co. a purchase of specific articles, as they now pretend. That agreement expressly states that the iron to be sent to San Francisco was then "lying in Boston or New York;" and it refers to the shipment thereof "from *either* Boston *or* New York." In fact, two-thirds of it was shipped from New York, and received without objection on that account. Could this have been specific iron shipped from Wales to Boston, to go thence to San Francisco? 9. *Prima facie*, the identical-rail-notion would have had more reason or color, if the plaintiffs had contended that the original contract with Weld & Co. was for specific rails to be thereafter manufactured to order, according to the patterns. And there are words in the contract which might be wrested to favor this construction. But the facts noted in the preceding subdivision 7, conclusively repel it; and Robinson could not help swearing to the well known fact that Weld & Co. were constantly "receiving and selling iron of the same make and pattern, from the same parties." 10. Unless there be a clear indication to the con-

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trary, a contract for the sale and delivery of merchandise of a particular kind or description is never deemed a *sale of specific articles*; but an executory agreement for the sale of any articles answering the description which the seller may deliver or tender. 11. The references to acts in Wales, as a guide in ascertaining the price to be paid the purchaser, cannot be used for the totally different purpose of converting the contract into a sale of specific articles.

III. The identical-rail-notion being, as is above shown, wholly unfounded, the alleged misrepresentation, if made, was perfectly immaterial.

IV. The railroad company had made its own contract with Weld & Co., and furnished its patterns. The defendants had no connection, directly or indirectly, with questions of quality, kind or fitness; and the alleged representations bore upon none of these questions. Robinson does not pretend to have directed his inquiries to any of these particulars. His *point*, as he states it, is a merely technical one; it is such as a captious person might devise to "wriggle out of a contract." So, if the identity was not material, the plaintiffs' sole point failed.

V. If the identity of the iron had been material, the plaintiffs failed to establish a case. 1. One of the seller firm, one of the intended carrier firm and two of the consignor firm were present. The joint guarantor interest was duly represented. The question put by the proposed new party, Robinson, looked to the substitution of his firm in place of the railroad company. His question was addressed to each of the three firms present, by its representatives; and it must have been understood as a call upon each to say whether *his* firm was ready to comply with such firm's part of the contracts. The identity of the iron was a point for Weld to answer. No one else could possibly have been able to answer it. It related to a matter necessarily outside of the personal knowledge of Flint and Gliddon, or either of them. 2. This meeting was held

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because Robinson "had notified them, (i. e. all these three firms,) by letter from New York," to meet him. In his cross-examination he states that his inquiry about the iron was answered at this interview. The answer was, "that they had the iron on hand." He don't remember who made that answer. He knows that it was not Mr. Gliddon. That Weld did not give the answer, is a mere conjecture. A. "I feel sure that he did not, because the only answer he gave was the answer about which we quarreled. Q. He took no part in the conversation? A. I presume he did; but do not remember the particulars." Had a jury turned their back upon common sense, and from this evidence found a verdict that the carriers gave the answer, and, therefore, mulcted them in damages for fraud, would it not have been the duty of the court to set it aside as wholly without rational support. 3. The fair interpretation of the first conversation is that Weld's firm, through Mr. Weld, and the two defendant firms, on their parts, respectively, represented each its own ability to carry out its own contract, and not that either represented anything in relation to other. It was well nigh impossible that either could know anything about the ability of the other. And, certainly, there was no affectation of any such positive knowledge. 4. To create a liability for damages consequent upon representations alleged to be false, the plaintiff must show, 1st. That the representation was untrue. 2d. That the defendants knew it was untrue. (*Oase v. Boughton*, 11 Wend. 108. *Williams v. Wood*, 14 id. 126. *Freeman v. Baker*, 5 Barn. & Ad. 797. 2 Steph. N. P. 1281.) 3d. That the defendants made the representation with intent to deceive. (*Young v. Covel*, 8 I. R. 23. *Addington v. Allen*, 11 Wend. 374. *Willink v. Vanderveer*, 1 Barb. 599. *White v. Merritt*, 7 N. Y. 352. *Zabriskie v. Smith*, 13 id. 322, 330. *Cazeaux v. Mali*, 25 Barb. 583, 584.) 4th. That the plaintiff acted in reliance on the defendant's representation, under circumstances in which he had a right to

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rely thereon. 5th. That he was deceived thereby, and so induced to change his relation to the subject, to his damage. 5. There was an utter want of proof that the defendants knew that the representation was untrue. The plaintiff was in communication with Weld; and for aught that appears, the defendants believed, as fully as the plaintiff could have believed, that Weld told the truth. (*Van Epps v. Harrison*, 5 Hill, 69, and cases there cited. *Davis v. Meeker*, 5 I. R. 354.) (a.) The plaintiff being in personal communication with Weld for the very purpose of obtaining the information, Weld being the very person who had actual knowledge on the subject, the defendants would not be liable if Weld deceived the plaintiff; for there is no presumption that they were not also deceived. (2 Steph. N. P. 1281, and cases cited.) (b.) The defendants had reasonable ground for believing Weld's representation to be true; consequently, no action lay against them. (See *McCracken v. Chohwell*, 4 Seld. 133.) 6. If Gliddon, at a period long subsequent to these transactions, did say it was not the same identical iron, the circumstances connected with that statement show that he neither admitted, nor was understood to admit, that he had any such knowledge when the original representation was made. It was a just inference established by the prior evidence, that at the time of the Boston conferences in January, 1855, Weld was the sole originator of the supposed representation that it was the same identical iron; and there was nothing in the subsequent conversation to vary this. 7. It is settled law that a plaintiff should be nonsuited whenever the evidence is such that a verdict in his favor would be set aside on motion. (*Rudd v. Davis*, 7 Hill, 529. *People v. Cook*, 4 Seld. 70. *Cox v. Hickman*, 8 House of Lords Cases, 299.)

VI. Even if the iron originally imported to comply with the order had been all sold to others, the company would not have thereby acquired, as the plaintiffs mistakenly suggest, a right to abandon the contract with Weld & Co.

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Neither did any obligation rest upon Weld & Co. by force of their agreement, to have on hand in Boston in January, 1855, any rails whatever. 1. As before stated, the substance of Weld & Co.'s contract was to deliver rails in San Francisco. What is said about Wales has reference only to computations of interest and the acceleration of delivery in San Francisco. 2. The first lot, say 500 tons, was all at San Francisco before 20th November, 1854. The charges on this quantity, amounting to \$19,000, were to have been reimbursed in cash, and the price of the iron paid by properly secured notes "on arrival." In January, 1855, the company was altogether in default. It had paid nothing; it had secured nothing; and it was not until Robinson's return to California in the summer of 1855, that any of these payments were made, or any of the iron received. 3. The business lay in this condition when Robinson visited Boston in January, 1855. It would have been most unreasonable to require that Weld & Co. should keep the identical rails of the other 1500 tons on hand in Boston all this time awaiting a resuscitation of this dormant company.

VII. If Weld & Co. were the defendants, the acceptance and use of the rails would bar the plaintiffs' action. (*Salisbury v. Stainer*, 19 *Wend.* 159. *Hargous v. Stone*, 5 *N. Y.* 73, 86, 87. *Sprague v. Blake*, 20 *Wend.* 61. *Howard v. Hoey*, 23 *id.* 352 to 354. *Hyland v. Sherman*, 2 *E. D. Smith*, 234. *Ely v. O'Leary*, *Id.* 355. *Warren v. Van Pelt*, 4 *id.* 202.)

VIII. The rulings in the course of the trial were unexceptionable. The exceptions should be overruled and the nonsuit affirmed.

By the Court, CARDOZO, J. The complaint was properly dismissed, in both aspects in which the cause of action was presented.

There was no warranty upon the part of these defend-

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ants as to the iron. Their undertaking, in that respect, was to send to San Francisco iron lying in Boston or New York, and a suitable description, so as to identify it, was inserted in the contract. If the article was not at the places from which they were to transport it, they could not send it, and the omission would be no breach on their part. The language was simply descriptive, and did not constitute a warranty that the particular article existed.

On the other branch of the case it is enough to say that there is not any evidence that these defendants knew the representation, if made by them, (which it is not necessary to determine,) to be false. The very gist of the action for deceit is the fraudulent intent with which the representation is made; and that intent is not established by proof merely of the falsity of the representation; but knowledge when it was made, by the party making it, that it was false, must be shown. (*Marsh v. Falker*, 40 N. Y. 562, and cases cited.)

There is no proof that these defendants, if they made the representations, did not believe them to be true. The fact as to the identity of the iron was matter within the knowledge of Weld & Co.; and it is quite likely that whatever information the defendants possessed was obtained from that firm. And there is nothing to show that they did not believe, or had not the right to believe, in the truthfulness of the information they had acquired.

I think the judgment should be affirmed, with costs.

Judgment affirmed.

[FIRST DEPARTMENT, GENERAL TERM, at New York, November 1, 1870. *Ingraham*, P. J., and *Geo. G. Barnard* and *Cardozo*, Justices.]

THE PEOPLE, *ex rel* Kinney, *vs.* THE BOARD OF SUPERVISORS
OF CORTLAND COUNTY.

To provide in advance for the official printing of the several county officers, is no part of the duty of a board of supervisors.

The board has no authority or power, except what is derived from the statute; and the statute does not authorize or empower them to contract, in advance, for such printing.

They have no power or authority to direct the clerk of the board whom he shall employ to do his official printing; or to direct, in advance, what price he shall pay, or agree to pay.

When a bill is presented, for services rendered to the county, the supervisors—unless the compensation for such services be fixed by law, authority, custom or binding contract—have to consider and pass upon the charges, and allow such sum as in their judgment is right and proper. In such cases, they have a *discretion*, which will not be interfered with by a *mandamus* directing how that discretion shall be exercised.

If the statute prescribes the sum to be received for such services, the board are required to allow the bill according to such statute. They have no discretion over it.

If the sum is fixed by a binding contract, the board are equally bound to allow the bill, in accordance therewith.

The contracts of a county clerk, in the name of the county, for printing necessary and proper to enable him to perform the duties of his office, are binding upon the county.

And an individual having been employed by a county clerk or surrogate to do his printing at an agreed price, such employment being within the scope of the clerk's or surrogate's authority, and the sum agreed to be paid being no more than a reasonable compensation for the services, the board of supervisors are not at liberty to interfere with such contract, but should cause to be levied and paid the amount due thereon.

The relator having done printing for the sheriff, at his request, but without any contract as to the price, such printing consisting of legal notices required by law to be published; *Held* that he was entitled to charge therefor the sum allowed by law; and that the board of supervisors should have allowed him that amount, without any deduction.

When the statute allows an individual to collect, for a service rendered the county, not more than a sum specified, he cannot be compelled to take less.

When a newspaper is designated by a board of supervisors as one of the papers in which the session laws shall be published, in the absence of any contract with the proprietor, as to his compensation, he is entitled to the compensation prescribed by law; and the board of supervisors has no right to reduce the allowance to him below that amount.

After a board of supervisors had passed upon an account presented by the

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relator, it caused to be made and delivered to him, an order on the treasurer, for the payment of the amount allowed. The relator refused to receive it in full of his claim, and notified the person handing it to him that he should at once commence a proceeding to compel the board to allow him the balance claimed. He subsequently tendered back the order to the same person, who refused to receive it. He afterwards received, and retained, the avails of the order. *Held* that the relator was not *estopped*, by this act, from disputing the correctness of the action of the board.

And that the act of receiving the money on the order, and retaining it, was no accord and satisfaction, because the relator refused to receive it in full.

APPPLICATION for a mandamus, to be directed to the defendants, requiring them to audit and allow certain claims of the relator against the county of Cortland, for printing.

The action was tried at a special term, before Justice MURRAY, without a jury, a jury trial having been waived by the parties. Such justice, after hearing the proofs and allegations of the parties, found the following facts :

On the 21st of November, 1868, the board of supervisors of the county of Cortland passed a resolution that its clerk should, for two weeks after that date, receive sealed proposals for printing, per folio, all blanks and the court calendars necessary for the use of the county judge and surrogate, also for the district attorney, sheriff and the county clerk ; and that each of said officers be required to certify and report to the board the number of folios of printing that should be done for them, respectively, to supply them with such blanks. That the said clerk, on the 8th of December, 1868, at 2 P. M., should open said sealed proposals, in the presence of the board ; which should award the contract for such printing to the lowest responsible bidder. The clerk gave notice and received proposals in pursuance of said resolution. Three proposals were made, and opened, on the said 8th of December, among which was one by B. B. Jones, that he would print the blanks for the use of the several officers, for thirty cents per folio for the first hundred, and twelve

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cents per folio for each hundred after the first; court calendars for ninety cents per page, in proper binding. The board adopted a resolution that its clerk be requested to enter into a contract with said Jones to furnish the blanks for the use of the several county officers, and also the court calendars, in accordance with his offer, and notify the several county officers of said contract, and request them to give all orders for what blanks they might need in their respective offices to the said Jones, a reasonable time before they were needed. The clerk gave notice to the several officers, in accordance with said resolution. The relator made no proposition to do this printing. On the 20th of November, 1868, the said board duly elected the "Cortland County Standard," the paper of which the relator was proprietor, as one of the county papers to publish the session laws of 1869. There was no agreement between the relator and said board, as to what he should have for publishing the said laws. The relator had made no proposition as to what he would do it for. During the winter, spring and summer of 1869, the relator duly published the laws of that year, of which there were 885 folios.

The relator made out an account against the county, for printing done by him, under various contracts, according to the contract prices. That which was done at the request of the sheriff before May 11, 1869, was charged according to the act of 1859; that which was done afterwards was charged under the act of 1869. That the printing so done was worth what the relator charged, according to the usual rates charged by printers. That he charged, in his account for printing the session laws, \$442.50, which was at the rate of fifty cents per folio, and his account was made up by adding the said \$442.50 to an item of \$357.70 for other printing, making, in all, \$800.20. The relator presented this account to the board of supervisors, at its annual meeting, in November, 1869. The

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account presented was verified, and no objection was made by the board that it was not duly and properly verified. The account was referred to a committee of the board for examination. While the committee had it under consideration, the board, on the 17th of November, 1869, adopted a resolution that all the printers of the county who had printed blanks and court calendars for any of the officers of the county, should not be allowed any more for such printing, than the price agreed upon in the contract with Jones. Afterwards, the committee reported in favor of auditing the account at \$313.10, without stating what items, or parts of items, of the account were rejected or allowed. The action of the committee was approved by the board. The committee of the board did not notify the relator that there was any objection to the account, or any part thereof. He was not called upon to explain, or to give evidence in regard to the account, or any item thereof.

On the 11th of May, 1869, an act was passed, by the legislature, allowing printers, for printing the session laws, not to exceed fifty cents for each folio, and not less than thirty, as the board should determine. The relator printed 885 folios of session laws, which, at thirty cents a folio, would be \$265.50, leaving only a balance of \$47.60 to pay for the other printing, as allowed by the board. From this, the justice found that the board had not allowed the relator what he was entitled to, for printing the session laws. He also found that the relator printed 118 pages of court calendar, which, at ninety cents a page, (the price specified in the Jones contract,) would amount to \$106.20; and that the other printing, done by the relator, aside from the session laws, according to the prices in the Jones contract, would amount to \$107. From this he found that the board, in auditing the relator's account, had allowed him, for printing the session laws, \$100, and for the other printing according to the Jones contract.

The board caused an order to be drawn on the treasurer

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of the county, in favor of the relator, for the amount thus allowed him, in full of his account, and caused one of its members to deliver the same to him. The relator received it, saying, however, he would not receive it in full of his claim, and that he would commence a proceeding, at once, to compel the board to allow the whole account. He afterwards tendered back to the person of whom he received it, the said order. This proceeding was then commenced. The relator received the avails of the order, and still has them, and has not paid the same into court. The balance rejected amounted to \$487.10.

The judge's conclusions of law were that the relator was not estopped from disputing the correctness of the action of the board by having received and retained the order, and the avails thereof, in the manner he did. That it did not constitute an accord and satisfaction; and it was not seeking to recover a split up claim in another action. That the relator was entitled to have that portion of his account which was for services done under contracts with the clerk and surrogate, audited and allowed by the board at the contract prices; and that portion of the account which was for printing done at the request of the sheriff and clerk of the board of supervisors should be audited and allowed, as charged in the account, at the rates fixed by the acts of 1859 and 1869. That the printing done for those four offices amounting, according to the contract prices, and according to those acts, to the sum of \$357.70, there should be deducted from that amount the money received by the relator on said order, \$313.10, leaving a balance of \$44.60. That the relator was entitled to interest thereon from the 1st of February, 1870, to May 19, 1870, the date of the decision, amounting to \$0.93, which, added to \$44.60, amounted to \$45.53; which the relator was entitled to be allowed and have audited. And that the relator was entitled to have the said board pass upon his account for printing the session laws, and allow him

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for printing 885 folios, at not less than thirty cents a folio, and not more than fifty, as they should determine; and when the account was so audited and allowed for printing the session laws, the board should add the amount thereof to the aforesaid \$45.53, allowing interest thereon from the 19th of May, 1870, and cause the whole amount to be levied and collected, and paid to the relator.

A. P. Smith and *M. Goodrich*, for the relator.

M. M. Waters, for the defendants.

MURRAY, J. In December, 1868, the board of supervisors of Cortland county contracted in advance for all the printing required by the county officers of that county for the coming year, at a fixed price, with one Jones. The county officers did not regard that contract as binding upon them, and each employed the relator to do his official printing. The clerk and surrogate agreed with him, as to the price of the printing done for each of them. The price agreed upon was reasonable, and according to the usual rates charged by other printers, for the like services, but more than Jones had contracted with the board to do it for. At the annual meeting of the board, in November, 1869, the relator presented his bill for printing done for the clerk and surrogate, according to the price agreed upon between him and them, and the printing done for the sheriff, according to the rates by statute, and for printing the session laws. The board, regarding the contract it had made with Jones for the printing of that year, as binding upon those officers, audited and allowed the relator's bill according to the rates prescribed in the Jones contract. If the board was right as to the binding nature of that contract, it was right in allowing the bill according to it. The relator, knowing of such contract, and agreeing to run the risk of getting his pay according to the

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contracts made with such officers, stands in no position by which he can be protected from the consequences of such contract.

To provide in advance for the official printing of the several county officers is no part of the duty of the board of supervisors. The board, in performance of its duty, is governed by the statute. It has no power or authority except what is derived therefrom. The statute does not authorize or empower them to contract, in advance, for such printing. (*The People ex rel. Hasbrouck v. The Board of Supervisors of the County of New York*, 21 *How. Pr.* 322. *S. C.* 22 *id.* 71.) It leaves those officers to perform their duties under the direction of the statute, untrammelled and uninfluenced. They take an official oath for the faithful performance thereof, and are responsible to the power that gives them their official existence, for the manner in which they do it, and are liable to impeachment in case they corruptly neglect or refuse to perform their duty. The supervisors have no supervisory power over them. They have no power or authority to direct the clerk whom he shall employ to do his official printing. They have no power to direct, in advance, what price he shall pay or agree to pay. That trust has been reposed by the people in him, and what he does as such officer is entitled to respect as the act of an officer of the county.

But the board occupy a very important position. No sum of money can be collected of the people, for the payment of bills, except by its action. All bills against the county are to be presented to and audited by it. Unless the sum for such services be fixed by law, authority, custom or binding contract, its members have to consider and pass upon such charges and allow such sum as in their judgment is right and proper. In such cases their judgment cannot be interfered with by any court on an application for a *mandamus*. In those cases they have a

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discretion, and no court will interfere by *mandamus*, to direct how that discretion shall be exercised. (1 *Oowen*, 417. 30 *How. Pr.* 173. 33 *Barb.* 603. 26 *id.* 118. 1 *Hill*, 362.)

If the statute prescribes the sum to be received for such services, the board are required to allow the bill according to such statute. It has no discretion over it. The legislature has passed upon the question, and the board can only carry out its requirements. If the sum is fixed by a binding contract, the court is equally bound to allow the bill in accordance therewith. In this case the clerk and surrogate contracted with the relator to do the printing he did for them, at a specified price. The several contracts of the clerk were for the printing necessary to enable him to perform the duties of his office. It was legitimate and proper printing for him to procure to be done. (21 *How. Pr.* 322. 22 *id.* 71.) As to such printing, his contracts in the name of the county were binding upon the county. (3 *Wend.* 193.) The clerk could have paid for the printing, himself, and presented his bill for the money paid. (18 *John.* 241.) He could procure the printing to be done on the credit of the county, as is usual, and the person doing it could present the bill and be entitled to be allowed the price agreed upon between him and the clerk. The relator having been employed to do his printing at an agreed price, it being within the scope of the clerk's authority, the sum agreed to be paid being no more than a reasonable compensation for the services, the board is not at liberty to interfere with that contract, but should cause to be levied and paid the amount due thereon. If a dealer or mechanic makes a contract with a public officer, in the name of the county, as to a matter within the scope and authority of that officer, and a contract he had a right to make, it is binding upon the county, and must be performed, the same as if it was between two private individuals.

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It is insisted, on the part of the board, that the Jones contract was much more favorable to the county than the relator's contract, and the clerk, knowing what Jones was to do the printing for, had no right to make a contract agreeing to pay a greater sum. If it was claimed that there was a fraudulent contrivance between the clerk and the relator, to cheat the county, this would be an important circumstance for consideration. I do not understand from the return and pleadings that any such issue is presented. Neither do I understand it to be claimed, on the trial, that there was any such fraudulent contrivance. It can hardly be questioned that the parties to the transaction acted in good faith. Indeed the clerk testified that he considered the terms he made better for the county than the Jones contract, but I think it did not turn out to be so. Fraud would vitiate the contract he made with the relator. But if there was no fraud, the fact that he agreed to give more than the Jones contract, has no legal effect. It in no way changes the legal aspect of the case.

The same reasoning is applicable, in all respects, to the contracts the relator made with the surrogate. The contracts made with him were similarly situated; the same conclusions must be had as to them.

As to the printing done for the sheriff, there was no contract as to the price. The sheriff requested the relator to do it. He did it, and charged, for all that was done before the 11th of May, 1869, according to the law of 1859, and all subsequent to that time, according to the law of 1869. The printing consisted of legal notices required by law to be published. Chapter 252 of the laws of 1859 provides that the proprietor of any newspaper may charge and collect, for publishing any notice, order, &c., not more than seventy-five cents per folio, for the first insertion, and thirty cents for each subsequent insertion. Chapter 831 of the laws of 1869, passed May 11, 1869, so amends the act of 1859 as to allow the printer fifty cents per folio

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for each subsequent assertion. By these acts the printer is allowed to collect not more than the sum specified. He cannot be compelled to take less. The statutes say he may collect that sum. The board has not the power to say it will not allow him to collect so much; that would be coming in direct conflict with the acts; it would be defying their power. That, the board, I am very sure, did not design to do. Therefore the bill for the sheriff's printing should have been allowed without deduction in this respect. I do not express an opinion upon the question whether the act of 1869 does not govern the charges in the whole bill for sheriff's printing; notwithstanding a part of the services were performed before the act was passed. Because I understand those services performed before the act was passed were charged in the bill according to the act of 1859, which renders it unnecessary to consider that question.

There is still another view to be taken of the action of the board upon this account, aside from the session laws, from which the conclusion is derived that the action of the board was erroneous. It did not pass upon the account, otherwise than to ascertain how much it would come to, allowing for the different items the prices specified in the Jones contract; that contract had no binding force upon it; it should not have been taken as a guide in its action upon the account. If there had been no law or contracts by which it was required to allow the different items so as to bring it under its discretion, it should have examined each of them, if necessary, taken evidence, heard proofs and explanations from the relator, clerk and others, and with the best lights they could get to guide the members of the board, determined what, in their judgment, was right and proper to be allowed for such services. That it has not done. Under these circumstances, the board would be required to act upon the matter. (*Hull v. The Supervisors of Oneida*, 19 John. 259.

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Plumb v. The Supervisors of Cortland, 24 How. Pr. 119.) As to printing the session laws, the paper of which the relator was proprietor was one of the papers duly selected to perform that service. There being no contract with him, as to his compensation, he became entitled to the compensation the law prescribed. By chapter 831 of the laws of 1869, it is provided that for printing the session laws the printer shall receive not less than thirty cents per folio, and not more than fifty. There were 885 folios. At thirty cents, it would amount to \$265.50; at fifty cents, it would amount to 442.50. The board allowed him only \$100. The act of 1869 is to be the guide in determining the compensation to be allowed, notwithstanding a part of the services were performed before the act was passed. The relator was entitled to be allowed not less than \$265.50, and not more than \$442.50, as the board should determine. Any amount over the *minimum* sum, and less than the *maximum*, was in the discretion of the board, and its determination will not be reviewed on a trial like this. The board, therefore, was in error in reducing the allowance to less than \$265.50. They had no power to do so, in the absence of any contract with the relator. In all this, there is no doubt that the board acted in perfect good faith, with the best of motives, with a commendable desire to lessen the expenses of the county, and reduce taxation upon the people. But at the same time when public officers are striving to protect and serve the public, they should be careful not to overlook, override or interfere with private rights and private contracts.

After this action of the board upon the relator's account, it caused to be made an order on the treasurer, directing the amount allowed him to be paid. The order was delivered to a member of the board, to be handed to the relator, which was done. The relator refused to receive it in full of his claim, and notified the person handing it to him that he should at once commence proceedings to

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compel the board to allow him the balance. He subsequently tendered back to the same person the order, but he refused to receive it. The relator afterwards received, and still has, the avails of the order. It is insisted that under these circumstances the relator is estopped from disputing the correctness of the action of the board. At the close of the trial, I was of that impression, but on reflection have come to a different conclusion. This, in the main, was a matter over which the board had no discretion; its action was unauthorized. By this unauthorized action they allow him so much in full of his claim. It is tendered to him; he takes it, but refuses to take it in full. He tenders it back; the board refuse to receive it. He is not estopped, for the reason that the board has done nothing; it has been induced to do nothing; it has lost nothing, in consequence of his receiving or keeping that order. The principle of disaffirming a fraudulent contract in actions to recover back what the party defrauded may have advanced thereon, does not apply to this proceeding. In such case there is a contract; if affirmed, the party cannot recover back. The party cannot disaffirm a contract, unless he restores the other party to his former condition. There is no contract, in this case, between the board and the relator, to affirm or disaffirm. The disaffirmance of an unauthorized proceeding before the board does not require that he shall restore all that he may have received thereon; that is, if he does not, it does not amount to an affirmance, as in the case of a fraudulent contract. I see nothing, upon principle, that precludes the relator, with that money in his pocket, from compelling the board to readjust his claim, and when readjusted, applying that money as a payment thereon. The principle in regard to splitting up claims has no application, in this case; it is not sought to recover part of a claim. The application is to readjust the whole claim, and treat

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the money in his hands as a payment. It is no accord and satisfaction, for the reason that the relator refused to receive it in full. (9 *Bosw.* 290, 299. 14 *Wend.* 100. 19 *id.* 516. 18 *N. Y.* 448.) The most analogous principle is in regard to appeals. The receiving of the avails of a decree in equity is no waiver of the right of appeal. (*Dyett v. Pendleton*, 8 *Cowen*, 325. *Clowes v. Dickenson*, *Id.* 328. *Higbie v. Westlake*, 14 *N. Y.* 281.) The relief established is substantially, though not precisely, what is demanded in the alternative *mandamus*. Therefore it is proper that a *mandamus* should issue to compel the board, at its next annual meeting, to audit and allow the relator's claim for printing for the clerk, surrogate and sheriff, as presented, deducting therefrom the \$313.10 received by him; to allow him interest on the balance, from the 1st of February, 1870; and to consider and pass upon his claim for printing the session laws, consisting of 885 folios; auditing and allowing him on this claim not less than thirty cents per folio, and not more than fifty cents; and to determine at what it should be allowed. Then to audit, levy and collect the whole bill thus adjusted.

The relator should be allowed costs of this proceeding.

[CORTLAND SPECIAL TERM, May 2, 1870. *Murray*, Justice.]

GOTCHEUS *vs.* MATHESON and others.

The act of congress approved March 8, 1865, amending the several previous acts providing for "the enrolling and calling out of the national forces," &c., which provides, (§ 21,) that in addition to the other lawful penalties of the crime of *desertion* from the military or naval service, there shall be a forfeiture of the rights of citizenship, &c., is constitutional. It is not an *ex post facto* law; neither is it a bill of attainder for the reason that it contemplates a trial by a court martial to enforce that penalty, together with the other penalties for desertion.

Inspectors of election have no right to exclude the vote of an individual, on the ground that the person offering it is a deserter from the army; where there is no evidence produced before them of the *conviction* of such person as a deserter and his consequent forfeiture of the rights of citizenship.

DEMURRER by the plaintiff to the second defense in the defendants' answer. The action was brought to recover damages of the defendants, for illegally excluding the plaintiff's vote at an election at which they were inspectors. The facts are stated in the opinion.

Hunt & Green, for the plaintiff.

L. Seymour, for the defendants.

MURRAY, J. The defendants were inspectors of election in district No. 2 of the town of Triangle, in Broome county. At the general election, in November, 1868, the plaintiff offered his vote to them as inspectors, and they excluded it. He brings this action against them, for damages, and alleges that they illegally excluded his vote. The defendants Matheson and Johnson, as a several defense in their answer, allege, on information and belief, that the plaintiff, prior to the 3d day of March, 1865, had been in the military service of the United States, and had deserted therefrom, and did not return to said service, or report himself to a provost marshal, within sixty days after the proclamation mentioned in section 21 of the act of congress, entitled "An act to amend the several acts heretofore passed, to

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provide for the enrolling and calling out of the national forces, and for other purposes," approved March 3, 1865. That when the plaintiff offered his vote, at said election, he was duly challenged on the ground that he had deserted from the military service of the United States, and had not returned thereto, pursuant to the requirements of the said act. That the defendants, thereupon, as in duty bound, and by law required, administered to the plaintiff the oath by law provided for such cases, and the plaintiff then and there refused to answer any questions that might be put to him in relation to the ground on which such challenge had been made; except that he stated that he had been in such military service. And the defendants then and there refused to receive his said ballots, or to permit him to vote.

The plaintiff demurs to this defense, on the ground that the matters alleged do not constitute a defense. By the demurrer, the plaintiff admits the truth of the matters therein stated. The question is thus raised—assuming all the matters therein stated, to be true—were the defendants required by law to allow the plaintiff to vote?

By the statement in said defense it appears that the plaintiff's vote was challenged on the ground of his being a deserter. No other ground is stated. I am required, therefore, to assume that in all other respects he had the undisputed qualifications of a legal voter.

Section 21 of the act of congress, approved March, 1865, referred to in the said defense, provides that in addition to the other lawful penalties of the crime of desertion from the military or naval service, "all persons who have deserted the military or naval service of the United States, who shall not return to said service, or report themselves to a provost marshal, within sixty days after the proclamation hereinafter mentioned, shall be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship, and their rights to become citizens; and such

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deserters shall be forever incapable of holding any office of trust or profit under the United States, or exercising any rights of citizens thereof. And all persons who shall hereafter desert the military service, and all persons who, being duly enrolled, shall depart the jurisdiction of the district in which they are enrolled, or go beyond the limits of the United States, with intent to avoid any draft into the military or naval service duly ordered, shall be liable to the penalties of this section. And the president is hereby authorized and required forthwith, on the passage of this act, to issue his proclamation, setting forth the provisions of this section, in which proclamation the president is required to notify all deserters returning within sixty days as aforesaid, that they shall be pardoned on condition of returning to their regiments and companies, or to such other organizations as they may be assigned to, until they shall have served for a period of time equal to their original term of enlistment."

The president immediately issued his proclamation in pursuance of this section. The plaintiff, by his demurrer, admits that prior to the passage of this act he had been in the military service of the United States, and had deserted therefrom, and had not returned or reported himself, as required by the said act and proclamation. There is no allegation in the defense that the plaintiff had been tried by a court martial, and convicted of being a deserter, and a failure to return. That fact, therefore, is not admitted.

By the constitution of this State, a citizen of the United States, only, can vote at a general election. If, therefore, this act had the effect of depriving the plaintiff of his citizenship, and the inspectors had the proper evidence before them, they were justified in refusing his vote, and the defense is available to the defendants. But it is insisted, on the part of the plaintiff, that this act is in violation of the constitution of the United States, and void and without legal effect. It is claimed to be in violation in two

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respects; first, that it is an *ex post facto* law; second, that it is a *bill of attainder*.

It has been repeatedly held that to warrant the courts in setting aside a law as unconstitutional, the case must be so clear that no reasonable doubt can be said to exist. (*Fletcher v. Peck*, 6 *Cranch*, 128. *United States Bank v. Wheat*, 10 *Wheat*. 53. *Parsons v. Bedford*, 3 *Peters*, 433, 438. *Ogden v. Sanders*, 10 *Wheat*. 294. *Sedg. on Stat. and Com. Law*, 592.)

With this rule in view, I proceed to consider the question of the constitutionality of this act.

Subdivision 3 of section 9 of article 1 of the constitution of the United States provides that no bill of attainder, or *ex post facto* law, shall be passed. If this act comes under either of these classes, it must be held to be void, and no protection to the defendants.

At the time this act was passed, the government was engaged in a war. Subdivision 11 of section 8, of the said article, provides that congress shall have power to raise and support armies. Subdivision 13, of the same section, provides that congress shall have power to make rules for the government and regulation of the land and naval forces. Under these provisions, congress clearly would have the authority to pass said act, unless it comes under the class of cases prohibited by the said subdivision 3 of section 9 aforesaid.

This act must be construed by the light of surrounding circumstances. At that time the war had been waged for four years, with varied success. The army, which was very large, composed mainly of volunteers, had been at different times greatly depleted, and as often repleted. From this volunteer force there were many deserters. They were scattered, and skulking about in all parts of the country, and many in Canada. They had subjected themselves to the penalties of desertion. Congress then passed this act, having two objects in view. First, to re-

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plenish the army ; second, the humane purpose of relieving these persons from the penalties to which they had subjected themselves. By it they were assured of pardon for the past offense of desertion, on returning to duty within sixty days after the proclamation was made as required in the act. On failure to return to duty and accept the proffered mercy, they were to be deemed and taken to have voluntarily relinquished and forfeited their rights of citizenship, and their rights to become citizens, and be incapable of holding office under the United States. This was to be in addition to the other penalties prescribed for desertion. If this additional penalty was imposed as an additional punishment for the past offense of desertion, this would be an *ex post facto* law. An *ex post facto* law is one that has relation to a past act, and punishes as criminal the act that was innocent at the time it was done ; or adds to the punishment of an act that was criminal when done ; or increases the malignity of the crime ; or so retrenches the rules of evidence as to make conviction more easy. (*Hartung v. The People*, 22 N. Y. 95. *Shepherd v. The People*, 25 *id.* 406. 3 *Dallas*, 386.)

Such laws relate only to criminal and penal proceedings which impose punishment and forfeitures. This act is penal in its character, and provides for a forfeiture.

Desertion, before, was criminal under the military regulations of the government ; but before this act was passed, absolute forfeiture of citizenship, and right to hold office, was not imposed as a punishment. Therefore, if this was an additional punishment imposed on the original past crime of desertion, it would be *ex post facto*. I do not so understand it. Under this act, this new forfeiture is self-imposed, and is not on account of the past act of desertion, but on account of the renewed and continued breach of duty as citizens and soldiers in refusing to return to the service they had deserted, under the assurance of pardon. The act provides that in case of a failure to return, they

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shall be deemed, &c.—thus imposing this forfeiture upon the delinquency of not returning to duty. The not returning is made a new act of desertion, punishable by this forfeiture. It is a call upon them to return and sustain the government. They refuse. Pardon for past offenses is offered as an inducement, and to remove all obstacles. Yet, they despise the proffered mercy, and still refuse. The government is in need of men. The ranks of its army are thin. It calls upon these deserters to return. They refuse. This, under the act, constitutes new acts of desertion, for which this new penalty is imposed. When they thus refused they knew of the offer. They knew the consequences that would follow a refusal. They had sixty days in which to perform this duty. It cannot, therefore, be said to be an *ex post facto* law.

Is it a bill of attainder? Bills of attainder are such special legislation as inflict capital punishment upon persons supposed to be guilty of high offenses, such as treason and felony, without any conviction in the ordinary course of judicial proceedings. (3 *Story's Com. on Const.* 209. *Smith's Com. on St. and Const. Law*, 365, 366.)

Legislation, in like manner inflicting pains and penalties are included in the general designation of bills of attainder. (*Smith's Com. on St. and Const. Law*, 366. *Sedg. on Const. and St. Law*, 598. *Cummings v. The State of Missouri*, 4 *Wal.* 277. *Fletcher v. Peck*, 6 *Cranch*, 138.) In such cases, legislative bodies assume to exercise judicial powers, and perform the duties of judges in addition to their legitimate functions. They determine the guilt of parties without any of the safeguards of a formal judicial trial. The sufficiency of evidence is determined without any regard to rules. The punishment is fixed according to the notions of the legislative body, without hearing on the part of the accused. Such legislation is prohibited by the federal constitution.

The act in question imposes a forfeiture of citizenship,

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and right to hold office under the United States, as a penalty for a deserter failing to return to duty, according to the terms of the act. Citizenship of the United States is an important right, and the privileges conferred by it are important privileges, dearly prized by the American people. An act that provides for a forfeiture thereof imposes a penalty, and comes within the provisions of the constitution in regard to bills of attainder. (*Cummings v. The State of Missouri*, 4 Wal. 277. *Ex parte Garland*, Id. 333. *Green v. Shumway*, 39 N. Y. 418.)

Congress has entire control of the question of citizenship. It comes within its constitutional powers. It can make such rules and regulations in regard thereto as in its judgment are right and proper. Subdivision 4 of section 8 of article 1 of the constitution provides that congress shall have power to establish a uniform rule of naturalization. By this, congress is authorized to pass laws for the naturalization of aliens, which is to be the rule in every State in the union. Every person born within the United States is a citizen thereof. Congress, having the power to make rules for the government and regulation of the land and naval forces of the United States, has the power to impose penalties and forfeitures as a punishment for a breach of those rules and regulations. One of those penalties or forfeitures may be a forfeiture of citizenship and right to hold office under the United States—no matter whether that citizenship was secured by naturalization under the laws of congress, or by being a native born. (*Barker v. The People*, 20 John. 458.)

This act cannot be said to have been passed with a direct reference to voting in any State. Where, as in this State, the constitution and laws provided that no one shall vote unless he be a citizen of the United States, this act, when the penalty is enforced, might have the effect of excluding a voter. But the qualification of voters is entirely within the control of each State. Congress has no

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power to prescribe the qualifications of voters in the States. The people of this State, by an amendment of the constitution, could allow a person laboring under the disability created by this act to vote. (*Blair v. Ridgley and others*, 41 Mo.) It is the exclusive province of the State to regulate the qualification of its voters. It is the exclusive province of congress to regulate the question of citizenship of the United States. This, however, has no reference to any questions arising under the recent amendments of the federal constitution. The act in question is not obnoxious to the objection that it attempts to regulate the qualifications of voters in this State.

If it was the intention of congress, by this act, without a trial, or the adjudication of any court, to deprive this class of persons of citizenship, it would come under that class of legislation designated as bills of attainder. I think there was no such intention.

It can hardly be claimed that the trial before the inspectors of election holding office under our State laws, when the person offers his vote, could have been contemplated as a trial under this act, by the framers thereof. Their duty is to ascertain who are citizens; not to adjudge, declare and enforce forfeitures of citizenship. It is their duty to ascertain who are and who are not legal voters, and to reject the votes of those that are illegal, and receive the votes of those that are legal. In this case the plaintiff offered his vote, and the inspectors were satisfied, from the evidence given, that he was embraced in this class of persons described in said act as deserters who had failed to return. They honestly believed the act itself was sufficient to forfeit citizenship, and therefore excluded his vote; whereas, they should have gone further, and ascertained if the plaintiff had been convicted in any court, of being a deserter, and of failing to return. If he had been so convicted, his vote should have been excluded; if not, it should have been received. This act doubtless contem-

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plated a trial and conviction before a court martial, and thus to enforce the forfeiture. (*Huber v. Riley and others*, 53 Penn. 112.) That is the court that tries all military offenses. This penalty was to be in addition to the other penalties for desertion, to be enforced in like manner. But this penalty was absolute. The court had no discretion. On conviction it must be imposed. But conviction must always precede the punishment. The accused must be proved guilty before conviction. He must be heard, and have an opportunity to defend. He must be confronted by the witnesses against him. He might be able to show an excuse for leaving the army. He might be able to show an excuse for not returning. He has the right, and should have the opportunity, to present all such matters before a court martial, that it may pass upon their merits, and determine the guilt or innocence of the accused. The inspectors of election are not in a position to adjudicate these matters. They are not authorized to do so. They can determine who are citizens, but they cannot adjudge and declare, as an original adjudication, that the plaintiff's citizenship has been forfeited by the commission of an offense. They could receive as evidence such an adjudication made by another court, and give effect to its provisions by rejecting the vote, and thus depriving the person of the privilege of citizenship; but further than this I do not see as they could go.

I am therefore led to the conclusion that the act in question is constitutional; that it is not an *ex post facto* law; neither is it a bill of attainder for the reason that it contemplates a trial by a court martial to enforce this penalty, together with the other penalties for desertion.

But there was no evidence of conviction produced before the inspectors. For that reason there was no evidence of forfeiture of citizenship, and the inspectors had no right to exclude the vote.

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The demurrer should be sustained, and the defendants have leave to amend their defense, on payment of the costs of the demurrer, within twenty days, if they be so advised.

[BROOME SPECIAL TERM, June 18, 1870. *Murray*, Justice.]

IN THE MATTER OF THE APPLICATION OF THE PROTESTANT
EPISCOPAL PUBLIC SCHOOL, TERENCE FARLEY and others,
to vacate an assessment for a sewer in 74th street, from
Fifth Avenue to East River.

A statute affecting rights and liabilities should not be so construed as to act upon those already existing. And it is the result of the decisions, that although the words of a statute are so general and broad, in their literal extent, as to comprehend existing cases, they must yet be so construed as to be applicable only to such as may thereafter arise; unless the intention to embrace all is clearly expressed.

The construction of a sewer having been directed, by a resolution of the common council of the city of New York, proposals for the work were opened on the 6th day of April, 1865, the contract awarded to the lowest bidder, and the terms thereof agreed upon, and on the 18th of April a contract was executed between the corporation and such bidder. Intermediate the award and the execution of such contract, viz., on the 12th of April, 1865, the legislature passed an act declaring that no sewer should thereafter be constructed, in said city, except in accordance with a general plan of sewerage to be devised by the Croton Aqueduct Board. *Held* that the proceedings under the resolution having been regular, and in conformity to the requirements of the city charter, they vested in the person whose bid was accepted a right of which he could not be divested without compensation, and created a liability on the part of the city to him.

And that, so far as related to such vested rights of the bidder, the statute must be construed as prospective, and not retrospective.

THIS was an application to vacate assessments imposed upon the property of the petitioners, for the expense of constructing a certain sewer, in the city of New York.

In the matter of the Protestant Episcopal School, &c.

The construction of the sewer was directed by a resolution of the common council; proposals for the work were opened on the 6th of April, 1865; and a contract executed on the 13th of the same month. On the 12th of April, 1865, the legislature passed an act "in relation to sewerage and drainage in the city of New York," which gave the Croton Aqueduct Board power to devise and frame a plan of sewerage and drainage of the whole of said city. (*Laws of 1865, ch. 381, p. 715.*) The 8th section of that act was as follows: "It shall not be lawful, hereafter, to construct any sewer or drain in the city of New York, unless such sewer or drain shall be in accordance with the general plan devised by said Croton Aqueduct Board for the sewerage of the particular district in which such sewer or drain is proposed to be constructed."

The petitioners objected to the assessments in question, that no general plan of sewerage embracing the sewer in question had been devised by the Croton Aqueduct board, as required by said statute.

Charles E. Miller, for the petitioners.

D. J. Dean, for the mayor &c. of the city of New York.

BRADY, J. The sealed bids, or proposals, for the construction of the sewer mentioned in this application, were opened on the 6th of April, 1865. The contract was executed on the 13th of April; but before it was executed, and on the 12th of April, 1865, an act in relation to sewerage and drainage in the city of New York was passed by the legislature, (*Laws of 1865, p. 715,*) the 8th section of which declares, "it shall not be lawful hereafter to construct any sewer or drain in the city of New York, unless such drain or sewer shall be in accordance with the general plan devised by the Croton Aqueduct Board, for the

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sewerage of the particular district in which such sewer or drain is proposed to be constructed."

The general plan referred to is one which, by the provisions of the act of 1865, it was necessary to devise and adopt, but which, prior to such act, was not required, to enable the Croton board to make the proper engagements to have a sewer or drain constructed. It is now contended that this act, with the prohibitory section above recited, rendered the contract nugatory, and the assessments enforced to pay the expense incurred invalid, inasmuch as the sewer was not constructed in accordance with the general plan contemplated by the act of 1865. Is this objection well taken? The answer to this inquiry, in my judgment, depends entirely upon the question whether the contractor had any vested rights, and the corporation of New York had incurred liabilities with reference thereto, at the time of the passage of the act referred to. The charter of 1857, by section 38, provides that all contracts to be made or let by authority of the common council shall be made by the appropriate heads of departments, under such regulations as shall be established by ordinance of the common council; that if the work shall involve an expenditure of more than two hundred and fifty dollars, the contract thereto relating must be founded on sealed bids, or proposals, to be invited by advertisement; that all bids or proposals shall be publicly opened by the officer advertising for the same, in presence of the comptroller, and the contract given to the lowest bidder complying, in making the bid, with the preliminaries prescribed.

The ordinance of the common council in reference to these provisions, declares that at the time and place appointed for that purpose in the proposals, the head of the department, in the presence of the comptroller, and such of the parties making them as may desire to be present, shall then and there publicly open and read all estimates which he may have received for the contract mentioned in

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such proposals, and shall reject all estimates not furnished in conformity with the rules in relation thereto, and shall thereupon award the contract as prescribed in section 38 the city charter of 1857. (*Sec. 22, ch. 7, Revised Ordinances, 1866, p. 191.*)

It is not alleged that the bidder, to whom the contract under consideration was awarded, did not in all respects conform to the requirements of the charter, and the ordinances of the common council; or that there was any irregularity, in form or substance, in the advertisement, bid or award. It must be presumed, therefore, that on the 6th of April, 1865, when the sealed bids were opened, the award was properly and legally made, and the terms of the contract agreed upon.

These proceedings vested in the bidder a right of which he could not be divested without compensation, and created a liability on the part of the corporation to him. The bid having been accepted, the obligations disclosed were created. (*Russ v. The Mayor, 12 Legal Obs. 38. Smith v. The Mayor, 10 N. Y. 504.*)

Having arrived at this conclusion, the objection of the petitioners must be overruled. The act of 1865 must be construed, in reference to existing rights and liabilities, as prospective, and not as retrospective. The rule is, that a statute affecting rights and liabilities should not be so construed as to act upon those already existing; and it is the result of the decisions, that although the words of a statute are so general and broad in their literal extent as to comprehend existing cases, they must yet be so construed as to be applicable only to such as may thereafter arise; unless the intention to embrace all is clearly expressed. (*Moon v. Durden, 2 Exch. 22. Dash v. Van Kleeck, 7 John. 477. Wood v. Oakley, 11 Paige, 400. Johnson v. Burrell, 2 Hill, 238. Butler v. Palmer, 1 id. 324. Snyder v. Snyder, 3 Barb. 621. Hackley v. Sprague, 10 Wend. 114. McMannis, v. Butler, 49 Barb. 176.*)

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There is nothing in the act of 1865 which declares any such intention on the part of the legislature. It is silent upon the subject.

For these reasons the application must be denied.

[NEW YORK SPECIAL TERM, September 5, 1870. *Brady*, Justice.]

CONDERMAN vs. TRENCHARD and others.

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In an action upon a promissory note alleged by the defendants to have been given as the consideration for compounding a crime, it is not necessary, in order to render the note invalid, for them prove that the maker, in terms, agreed to compound a crime. If it be apparent that such was the intention of the parties, and the agreement was such as to carry out the intent, that is enough.

It is not necessary, in order to render such a contract invalid, that the person receiving the consideration should agree not to commence new proceedings against the person accused. It is enough that he obligates himself to release the defendant from a pending prosecution.

H. having been arrested upon a criminal warrant, on a charge punishable by imprisonment in a state prison, and being in actual confinement, awaiting examination, an arrangement was made between S., the person on whose complaint the arrest was made, and the defendants, by which the latter agreed to give their note to S. for the amount of his claim, constable's fees, and certain items owing by H. to other parties; and S. agreed that upon their so doing H. should be "released, so that he could go to work and earn enough to pay up the note." The note was given, accordingly, and thereupon H. was discharged, and no further proceedings were had, on the criminal complaint. *Held* that the proof showing that there was an agreement to terminate the criminal prosecution then pending, for a pecuniary consideration, and its termination in pursuance thereof, the whole proceedings were illegal and corrupt, and the promissory note given in performance of such agreement was void.

APPEAL, by the defendants, from a judgment entered upon the report of a referee.

The action was brought to recover the amount of a promissory note for \$150.70, given to one George W.

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Sherwood, by the defendants, which note was not negotiable, but was transferred to the plaintiff for a valuable consideration, before maturity. The facts in relation to this note, as set forth in the defendants' answer and established on the trial, were as follows: On the 13th of January, 1869, James E. Hicks, one of the defendants, was charged, on the oath of G. W. Sherwood, the payee of such note, with having, about the month of December previous, obtained from him certain board and livery hire, for himself and other persons, amounting to \$69, by the false pretense that he, Hicks, was engaged in buying wood and railroad ties, and that he then had a quantity on hand. That such charge by Sherwood, which was in the usual form of a complaint, was delivered to a justice of the peace of Steuben county, and a warrant in the usual form issued thereon, against Hicks; who was arrested thereon, on the 17th of January, 1869, and brought before the said justice. He then asked for ten days' time before being examined, which was granted, and Hicks was confined in the lock-up at Hornellsville, to await such examination. That while he was so confined, the other defendants agreed to and with Sherwood, to give the note in suit, being for the said \$99, and \$42.50 constable's fees, incurred upon such warrant, together with some other items that Hicks owed other parties, which Sherwood was to assume, and have Hicks released, so that he could go to work, and earn enough to pay up the note.

The referee found, as matters of fact, among other things, as follows: "That on the 27th day of January, 1869, the defendants and said Sherwood entered into an arrangement by which the said defendants should sign and deliver to Sherwood the instrument upon which this action is brought, to secure the payment of Hicks' indebtedness to Sherwood, together with some other items which Sherwood had become responsible for; and upon doing so, Hicks should be released, so that he could go to work

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and pay the matter up; and that the said agreement was carried out so far as executing and delivering the instrument by the defendants, but the same was not paid by said Hicks. That on the delivery of said executed agreement, Hicks was discharged, and no further proceedings were had, in the premises. That there was no agreement on the part of said Sherwood, to settle or compound the crime for which said Hicks was arrested."

The referee found, as conclusions of law, that the plaintiff was entitled to recover of the defendants the amount mentioned in said instrument, being \$150.70, less \$30, with interest on \$120.70 from the 28th day of April, 1869, amounting to the sum of \$128.18; for which sum he directed judgment to be entered, and from the judgment so entered, the defendants appealed.

Bemis & Near, for the appellants.

Holliday & Benton, for the respondent.

By the Court, MULLIN, P. J. This action was brought to recover of the defendants the amount due on a note made by them dated January 27, 1869, payable to George W. Sherwood, for \$150.70, sixty days from date. The note was transferred to the plaintiff by the payee, for a valuable consideration.

The defense set up in the answer, and in support of which, evidence was given, at the trial, was that it was given to compound a felony committed by Hicks, one of the defendants. It appears by the evidence, that Hicks had obtained board, and the use of horses and carriages, from Sherwood, named as payee in the note, under the false and fraudulent representations that he was engaged in lumbering, and buying ties, and that he had bought and paid for large quantities. A complaint was made before a justice of the peace of Steuben county, against

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said Hicks, who was arrested and brought before the justice issuing the warrant, and the hearing of the said matter was, at his request, postponed for ten days, and he was committed for safe keeping, during the ten days, to the lock-up in Hornellsville.

Several of the defendants desired to set him at liberty, so that he might go to work, and earn enough to pay the debt to Sherwood, the costs incurred in the proceedings, and several small debts due to other persons. Evidence was given, on the trial, tending to prove that before the note was given, it was agreed that if given, the proceedings should cease, and Hicks be set at liberty. Evidence was also given, tending to prove that the note was given in payment of the debts and expenses referred to above, but not for the purpose of compounding the offense with which Hicks stood charged. It was conceded that the prosecution ceased with the giving of the note, and Hicks was set at liberty. The referee finds that the defendants and Sherwood entered into an arrangement by which the defendants should sign and deliver to Sherwood the note in question to secure the payment of Hicks's indebtedness to Sherwood, together with certain other items for which Sherwood had become responsible; and upon so doing, he, Hicks, should be released, so that he could go to work, and pay the matter up; and the paper in question was then signed and delivered, and Hicks discharged, and no further proceedings had in the premises. The referee further finds that there was no agreement on the part of Sherwood to settle or compound the crime for which Hicks was arrested.

Bishop, in his work on *Criminal Law*, (§ 648,) defines compounding crime as being an agreement with the criminal not to prosecute him. By the *Revised Statutes*, (vol. 3, 5th ed. p. 969, §§ 18, 19, and by § 12, p. 973,) it is made a crime for any person having actual knowledge of the commission of a crime punishable with death, or in a state

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prison, or in a county jail, or by a fine, who shall take money or property of another, or any gratuity or reward, or any engagement or promise to compound or conceal such crime, or to abstain from prosecuting, or to withhold evidence; and upon conviction, the offender shall be punished, &c. The prohibition of the statute extends beyond the mere agreement not to prosecute, and subjects to punishment those who conceal the crime, or agree to conceal evidence. In *Chitty on Contracts*, (p. 673,) it is said: "Any contract which can prevent or impede the course of public justice is illegal." And he illustrates the proposition thus: An agreement in consideration of suppressing evidence, or stifling or compounding a criminal prosecution or proceeding for a felony, or misdemeanor of a public nature, as perjury, &c., is void. (*Steuben County Bank v. Mathewson*, 5 Hill, 252. *Coppock v. Bower*, 4 M. & W. 361. *Daimouth v. Bennett*, 15 Barb. 541. *Porter v. Havens*, 37 id. 343. *Keir v. Leeman*, 51 Eng. Com. Law, 308. *People v. Pease*, 16 Mass. 91. *Jones v. Rice*, 18 Pick. 440.)

The important question arising on this appeal is, whether the consideration of the note on which the action is brought was an agreement to compound a felony or misdemeanor, or to conceal the commission of either, or to withhold evidence in relation thereto, or to do any other act preventing or impeding the course of public justice. Hicks was in custody on process issued upon a criminal complaint; the object of Sherwood, and the persons signing the note, was to release him, not after an examination of witnesses to be produced against him, but before and without any examination. He was to be released so that he might go to work, and earn money to pay the note. To obtain this end, the abandonment of the proceedings against him was an essential requisite; and that they were not suspended, so as to be revived again, is shown by the fact that the costs of the pleadings were included in the note. Sherwood was not to appear against him, and he

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did not. The arrangement was consummated, and Hicks released.

It is not necessary for the defendants to prove that Sherwood, in terms, agreed to compound a crime, in order to render the note invalid. If it is apparent that such was the intention of the parties, and the agreement was such as to carry out the intent, it is enough. The person injured by the criminal act of another, in his person or property, may take from the wrongdoer compensation for the wrong. But he must not enter into any agreement to prevent, or stifle, a prosecution for the crime. If it were necessary to prove an express agreement to compound the crime, impunity could always be secured, and the suppression and defeat of criminal prosecutions would be made a source of profit. If the holder of forged paper may for a consideration surrender it to the forger and retain the price of his iniquity, because he did not in terms agree not to prosecute the criminal, the desired end will be obtained more effectually without, than it could be with, such an express agreement.

It is not necessary, to render invalid such a contract, that the person receiving the consideration should agree not to commence new proceedings against the person accused. It is enough that he obligates himself to release the defendant from pending prosecution. For if this were not so, a prosecutor might institute new proceedings every day, and use them to extort money from the offender.

It is almost of daily occurrence that persons instituting criminal proceedings agree to abandon them, upon being paid a consideration; and that contract is deemed to be perfectly just and fair, because it is not agreed not to institute any new or other prosecution. The only way to put an end to a practice so corrupt and oppressive, is to declare all such contracts to discontinue criminal prosecutions that are pending, and all agreements not to institute a criminal prosecution, as immoral and illegal.

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The case of *Porter v. Havens*, (*supra*.) is a very striking illustration of the strictness with which the courts construe contracts affecting the administration of justice. In that case G. F. Havens being under two indictments, one in this State, and one in Vermont, and in custody on process in Vermont, upon one of them, he, and his father as his surety, entered into an agreement with one Bowen, to whom G. F. Havens was indebted in the sum of \$2400, to give him notes for his debt, part of them signed by both him and his father, and part by George alone, under an agreement that they should be deposited in the hands of a third person, until the criminal prosecutions were ended, without further trouble or expense to said George, except counsel fees—then to be delivered, upon Bowen delivering to the persons holding the notes, discharges from certain claims; and the delivery was to be upon the further condition that he, Bowen, should not arrest or cause George to be arrested, on any process, but should cease all proceedings against him. When this arrangement was made, there was in the hands of the sheriff, process for the arrest of George, for the money owing by him to said Bowen. The criminal prosecutions being terminated, the notes were delivered to Bowen, and he transferred them to the plaintiff. On the trial the foregoing facts were proved; and the defendant having rested, the plaintiff proved by one Tracy that he was present at and drew the contract, and that there was no connection, to his knowledge, between the settlement and the indictments, other than appeared in the writing itself; and the arrangement as to the deposit and delivery to Bowen of the notes was, as he understood, for the benefit of the father. Bowen had nothing to do, so far as the witness knew, with the criminal prosecutions, except the one for false pretences in obtaining money from Bowen. The plaintiff offered to prove that the arrangement was not made at Bowen's request; that there was no agreement or understanding that

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Bowen should suppress or withhold any evidence, or to put an end to the prosecutions; and that he never did put an end to them, but that the same was done by the courts, without his procurement or interference; and that the said notes were not given to compound a felony or criminal offense. The evidence was rejected, and there was a verdict for the defendants. The general term affirmed the judgment, holding the contract immoral, illegal and void, and that the contract being unambiguous and clear, must be construed by itself; and that the parol evidence offered was, therefore, incompetent. The court construed the agreement by Bowen not to arrest, or cause to be arrested, the said George, as an agreement not to prosecute him for either of said criminal offenses, and for that reason illegal, because there was inducement and consideration to discontinue and terminate the criminal proceedings, and plainly to accomplish that result the note was given.

The facts found by the referee, in this case, show an agreement to terminate the criminal prosecution then pending, for a pecuniary consideration, and its termination in pursuance of it. I cannot doubt but that such an agreement is unlawful and void.

The further finding that there was no agreement to settle or compound the crime for which Hicks was arrested, is not only not supported by the facts proved and found, but is wholly inconsistent therewith. If the referee intended to find that there was no such agreement in terms entered into, his finding may be justified by the evidence of Sherwood and his attorney, Holliday. But it is not necessary that the agreement should be to compound the crime; it is enough that such is the legal effect of it, and that such was the intention of the parties.

Compounding a criminal offense is not, I have endeavored to show, the only thing that renders a contract void. An agreement not to give evidence, or to stifle a prosecu-

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tion, is just as corrupt as an agreement to compound a felony or otherwise; assuming that the word compound does not embrace all the acts which may be resorted to to prevent, embarrass or terminate a prosecution, in which sense it seems sometimes to be used.

It is suggested that by recent decisions of the Court of Appeals, obtaining money or other property by false pretences is not a felony, but is a misdemeanor. That it was an offense which the person injured might compromise, and hence it was not unlawful for him to receive from the wrongdoer compensation for the injury done him.

The difficulty in this case is, not that Sherwood received compensation, but it is that in consideration of receiving such compensation, he agreed to abandon a pending criminal prosecution. It is said in *Chitty on Contracts*, (p. 674,) that the general rule is, that when an offense may be made the subject of a civil action, as well as of an indictment, and criminal and civil actions are instituted, an agreement to pay the costs of the civil suit, on its being stopped, is binding, if the costs of the criminal proceeding are not included in the arrangement, and it is no part of the bargain that the indictment shall be abandoned.

In *Kier v. Lamon*, (51 *Eng. Com. L.* 308,) it was held that a party may compromise any offense, though made the subject of an indictment, for which he might recover damages in a civil action; but if the offense is of a public nature, no agreement can be valid that is founded on a consideration of stifling a prosecution for it. The right to recover compensation, in such cases, is regulated by statute, and to prevent abuse, the words prescribed by it should be followed. (3 *R. S.* 1021, §§ 70 to 74, 5th ed.) Those sections require that in cases of assault and battery, and other misdemeanors for which the injured party has a remedy by civil action, he shall appear before the magistrate before whom the criminal proceedings are pending, or before a county judge, and acknowledge satis-

Matter of the application of Douglass.

faction, in writing; and this officer, in his discretion, on the payment of the costs, may dismiss the proceeding.

Nothing of the kind was done, in this case. If, therefore, the statute applies, it does not aid the plaintiff. If it does not, and Sherwood had the right to compromise irrespective of it, his compromise was rendered illegal by reason of the agreement to discontinue the proceedings.

This case furnishes an illustration of the mischief that would result from permitting complainants to make contracts with those accused of crime. The note contains over \$42 for fees of the constable who made the arrest. That a most unjust advantage was taken of Hicks, not only in respect to the fees taken, but in requiring him to furnish security for claims the accuracy of which he had no means to ascertain, is evident.

The whole proceedings were illegal and corrupt. The judgment must therefore be reversed, and a new trial ordered; costs to abide the event; and the order of reference vacated.

[FOURTH DEPARTMENT, GENERAL TERM, at Rochester, September 5, 1870.
Mullin, P. J., and *Johnson* and *Talcott*, Justices.]

MATTER OF THE APPLICATION OF GEORGE W. DOUGLASS to
vacate an assessment.

The provision of the act of 1857, to amend the charter of the city of New York, (*Laws of 1857, ch. 446, § 7.*) requiring all resolutions and reports of committees which shall recommend any specific improvement involving the appropriation of public moneys, or the taxing or assessing of the citizens, to be published in all the newspapers employed by the corporation, is to be considered *directory*; and a departure therefrom through mistake, or even negligence, and not intentionally, will not vitiate the proceedings.

But the subsequent clause of the same section, which directs that such resolutions and reports "shall not be passed or adopted until after such notice has been published at least two days," is prohibitory; and the passage of a

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resolution or report without a compliance with the condition of such clause, is illegal.

The statute does not require two publications. It is sufficient if two days shall elapse between the publication of the notice and the passage of the resolution.

The adoption of the resolution means its passage by both boards; and it is only necessary that two days, after publication of the notice, shall intervene between the introduction of the resolution and its final passage in both boards of the common council.

GEORGE W. Douglass presented his petition, asking the court, under the act of 1854, to vacate an assessment which had been imposed by the municipal authorities upon property belonging to him, for the expense of grading and paving 64th street, between Third and Fifth avenues, in the city of New York. The facts are stated in the opinion of the court.

INGRAHAM, J. The objection to the validity of the assessment is, that the resolution and report of the committee were not published in all the newspapers employed by the corporation, immediately after the adjournment of the board. The statute contains the provision that the same shall not be passed or adopted until after such notice has been published at least two days. (*Laws of 1857, ch. 446.*) The proceedings were not published in all the papers, and the notice was only published in the daily papers prior to the passage of the resolution. So far as the direction of the statute is to publish the proceedings in all the papers employed by the corporation, I have no doubt that the same is to be considered directory, and that a departure therefrom through mistake, or even negligence, and not intentionally, would not vitiate the proceedings.

The difficulty arises from the subsequent clause of the act, which says: "All resolutions and reports of committees, which shall recommend any specific improvements, taxing or assessing the citizens of the city," &c., "shall not be passed or adopted until after such notice has been pub-

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lished at least two days." The prohibition against the passage of the resolution or report takes it out of the mere directory character of the proceedings, and makes the passage illegal, within the meaning of the act of 1858, (as therein designated a legal irregularity,) if the provisions of the statute are not complied with. It becomes necessary, therefore, to inquire what is meant by "such notice has been published at least two days." I think it is clear that the statute does not require two publications. It is sufficient if two days shall elapse between the publication of the notice and the passage of the resolution. The act does not anywhere require more than one publication in one paper; and the use of the word "notice" shows that the object was to give the parties to be assessed two days' notice, after its publication, before the adoption of the resolution.

This is not confined to each board. The adoption of the resolution means its passage by both boards, and it is only necessary that two days, after publication of the notice, shall intervene between the introduction of the resolution and its final passage in both boards of the common council.

The resolution was introduced in the board of aldermen July 20, 1863. The committee reported August 25, 1863. The resolution was finally adopted by the board of councilmen, September 24, 1863. The resolution was published in the *Tribune* and in the *Herald* July 7, and notice of the report of the committee on August 27; notice of its reference to the board of councilmen September 19, and of the report on September 23. More than two days elapsed after the publication of the notice, and the necessary publication, therefore, took place, unless it was necessary that publication should have been made in all the papers employed by the corporation, to give validity to the proceeding. I do not feel willing to give such a construction to this statute, which is not called for by the literal

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interpretation of it, so as to render these assessments illegal. The words of the act only require the publication of the notice to be for two days. It does not forbid the passage of the resolution until published in all the papers, but only until notice has been published for two days; and the provisions of the statute can be upheld by construing the number of papers to be merely directory, and the prohibitory portion of the act as satisfied by the publication of the notice in some of them, for at least two days before the resolution was adopted. It is not reasonable to suppose that the common council should be required to examine every newspaper employed by the corporation, to see if its resolutions, proposed to be passed, have been published in every paper so employed, before their passage. This I do not think was intended by the legislature.

My conclusion is, that there is nothing shown on the part of the petitioner, sufficient to invalidate this assessment.

Application denied.

[NEW YORK SPECIAL TERM, September 5, 1870. *Ingraham*, Justice.]

SHORT vs. BARRY.

A complaint stated that the plaintiff and defendant, being copartners in business, dissolved their copartnership, on a day specified, when it was agreed that an inventory should be taken of the assets of the firm, including the notes and accounts due to it, and that the defendant should pay the plaintiff one half of the amount of the inventory, deducting one half the liabilities of the firm, which the defendant assumed to pay; that such inventory was taken; the precise amount due to the plaintiff ascertained and agreed upon; and the defendant went into and remained in possession. The prayer was for an account of the partnership dealings, and that the plaintiff have judgment for the balance which should be found due him, on such accounting.

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Held that the complaint was clearly in an action at law; and the demand for an accounting was merely nugatory, it being not only wholly unsupported by any allegations in the complaint, but inconsistent with the case made by the complaint, which asserted that the account was adjusted, the amount liquidated, and the balance agreed to be paid.

Held, also, that although it appeared from the findings of the referee that an account was necessary to settle the equities between the parties, and an action might be maintained for that purpose, if the defendant should refuse to render such account, or to pay the balance; yet that such was not the cause of action set up in the complaint, which was assumpsit, at law, and not an action of purely equitable cognizance. And that the referee erred in proceeding to take an account.

An action at law, for goods sold and delivered, cannot be changed into an action in equity for an account between the parties.

APPREAL, by the defendant, from a judgment entered upon the report of a referee.

D. O'Brien, for the appellant.

N. Whiting, for the respondent.

By the Court, TALCOTT, J. The complaint in this action was clearly in an action at law. It states that the plaintiff and defendant were copartners in mercantile business; that they dissolved their copartnership in December, 1868, at which time it was agreed that an inventory should be taken of the assets of the firm, including the notes and accounts due to it, and that the defendant should pay the plaintiff one half of the amount of the inventory, deducting a certain debt due from the plaintiff to one McCormick, and also deducting one half the liabilities of the firm, which the defendant assumed to pay; and that thereupon such inventory was taken, the precise amount due to the plaintiff ascertained and agreed upon, and the defendant went into possession, and has ever since held the possession. The complainant also claimed to recover for the services of his minor son, who, he alleged, had been employed by the firm, on a *quantum meruit* agreement; and

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he avers the value of the son's services. For this aggregate amount he demands judgment. On this complaint, and affidavits tending to show that the defendant was about to depart the State with intent to defraud his creditors, the plaintiff obtained an order of arrest; a motion was made at special term to vacate the order of arrest, which was denied. The case is reported in 39 *How.* 326. The order of the special term was affirmed, at the last June term of this department.

The demand for judgment also contained a demand that an account of the partnership dealings be taken, and that the plaintiff have judgment for the balance found due him on such accounting.

The answer sets up that the agreement was that the defendant should take the goods and pay the debts of the firm, and should pay the plaintiff one half the value of the goods after the debts were paid; and that the notes and accounts due the firm were to be left with the defendant for collection, and the plaintiff's one half was to be paid over to him on collection. The referee found the agreement to have been different from the statement of either party. He found that the plaintiff sold out his interest in the stock of goods of said firm to the defendant, without specifying the time for the payment thereof; that an inventory was taken of the goods, and they were left and remained in the possession of the defendant; and that it was also then agreed that the notes and accounts due the firm should be kept in the possession of the defendant, and he should collect the same, and should pay the debts due by the said firm. That they were so left, and that the defendant had collected a large amount thereof, and had paid all the debts of the firm, and the debts due from the plaintiff to McCormick, which he finds were paid at the request of the plaintiff, without finding that it was a part of the agreement on the dissolution, that it should be so paid. Upon the state of facts so found

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by him, the referee determined, as matter of law, that the interest of the plaintiff in said stock of goods was to be paid for immediately by the defendant; and that an account should be taken between the parties, of the business of said firm; and he thereupon proceeded to take an account, as in equity, and as of the date of his report, charging the defendant, in the account, with more than \$700 for moneys collected by him after the action was commenced, and rendering a judgment against the defendant for \$1359.22, as the balance of the account due from the defendant to the plaintiff at the date of the report, and reporting that there was then still uncollected, quite an amount of the notes and accounts due the firm; the precise amount of which he did not and could not ascertain, and in respect to which he makes no provision whatever. In various forms, and at various stages of the case, the defendant objected to this taking of an account, and excepted to the referee's ruling on the subject.

If this were an action for an account in equity, the judgment ordered by the learned referee would, I think, be imperfect. In such a case, the final judgment between the parties should fully settle and finally determine all the questions between them, arising upon an accounting in respect to the affairs of the copartnership. In this case the referee has left open the door for an indefinite number of further suits concerning amounts which may hereafter be collected, or adjudged to have been collected, on the notes and accounts still remaining uncollected, and the number, amount or value of which are wholly undetermined by the judgment. In such a case a receiver should have been appointed to collect or sell the uncollected assets, and the final judgment should have disposed of all accounting between the parties as to such remaining assets. But I am of the opinion that the referee erred in going into the proceeding to take an account.

The complaint was upon a promise to pay an agreed

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and specified balance on the sale and delivery of personal property. It did not allege that there was an open or unsettled account between the parties; nor did it contain any allegation, such as fraud, accident or mistake, upon which an account stated and adjusted is to be opened and retaken; nor did it even allege that the defendant had ever neglected or refused to account, or any fact or circumstance showing the taking of an account to be necessary or proper. The demand for an accounting was merely nugatory; it was not only wholly unsupported by any allegations of the complaint, but was inconsistent with the case made by the complaint, which asserted that the balance was adjusted, the amount liquidated, and the balance agreed to be paid. On the findings of the referee, it is no doubt true, that an account is necessary to settle the equities between the parties; and an action might be maintained for that, provided the defendant should refuse to render such accounting, or to pay the balance; but that is not the cause of action set up in the complaint. It is a wholly different cause of action, being one of purely equitable cognizance; whereas the present action is an *assumpsit* at law.

As to the claim set up in the complaint, on account of the services of the minor son of the plaintiff, the referee finds against the plaintiffs, and that he has no claim on that account, either against the firm or the defendant, as he finds that instead of the agreement on that subject being as set out in the complaint, it was agreed between the parties, that the services of the son should be set off against the rent of the store occupied by the parties, and which belonged to the defendant; so that the cause is disembarrassed of whatever doubt might have been thrown over the character of the action by the fact that such claim was set up, and which, as stated in the complaint, would seem, if it had any existence, to be a claim against the firm. At the last June term we re-

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versed a judgment on the report of a referee, where a complaint stated a case for accounting between copartners, and the referee found there had been no partnership, but gave the plaintiff judgment as in an action at law, for the price of an engine, which in the complaint was alleged by the plaintiff to have been furnished by him to the alleged firm, of which he claimed to be a member; and our decision was based upon the ground that the complaint, being an action for an account in equity, could not be changed into an action at law to recover the price of goods sold and delivered. This case presents the precisely converse attempt, namely, to change an action at law for goods sold and delivered, into an action in equity for an account between parties.

There are various other questions, as to the admission of evidence, and the findings of the referee, touching the accounting, but as I am of the opinion that the judgment must be reversed, for the fundamental error in going into the accounting at all, I have not considered them.

The judgment should be reversed and a new trial ordered, costs to abide the event.

[FOURTH DEPARTMENT, GENERAL TERM, at Rochester, September 5, 1870.
Mullin, P. J., and *Johnson* and *Talcott*, Justices.]

MALLOY *vs.* THE NEW YORK CENTRAL RAILROAD COMPANY.

In an action to recover damages for personal injuries arising from negligence, the evidence touching the negligence of the parties is for the jury.

Whether it was negligence in the plaintiff to walk upon a sidewalk in a dark night, without a light, is a question of fact for the jury, and not a question of law for the court.

So, also, as to the treatment of the part injured; it being the duty of the person injured to take proper care thereof, and, if necessary, to employ a competent surgeon, evidence touching the injury, and its treatment, is properly submitted to the jury; and the question of the negligence of the plaintiff in regard to the injury is for the jury.

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Where the evidence tended to prove a severe, and probably permanent, injury to the plaintiff's hand and wrist, arising from the defendant's negligence; *Held* that a verdict for \$2500 ought not to be set aside on the ground that the damages were excessive.

A PPEAL by the defendant from an order made at a special term, denying a motion for a new trial.

The action was brought to recover damages for injuries sustained by the plaintiff in consequence of falling into a hole opened and left by the workmen of the defendant, in a public sidewalk, crossing its tracks at Niagara Falls. It was claimed by the plaintiff that the defendant was negligent in leaving the hole open and unguarded, during a whole night; and by the defendant, that the plaintiff was negligent in walking where he could not see without a light; also in omitting to apply proper remedies to his injured arm, after the accident. The facts proved are sufficiently referred to in the opinion of the court.

A. P. Laning, for the appellant.

Holmes & Fitts, for the respondent.

MARVIN, P. J. The evidence proved, or tended to prove, that the defendant, in the year 1862, while making certain repairs to its railway track, at or near Niagara Falls, took up and moved some of the planks of the sidewalk, which sidewalk crossed the said road-tracks, leaving a hole or depression of some twelve inches; that the plaintiff, in passing along the sidewalk, about 9 o'clock in the evening, a dark and rainy night, stepped into the hole, and fell, striking on his left hand, which was injured. There was considerable evidence touching the extent of the injury, and the condition of the sidewalk, as it was left by the servants of the defendant. There was a motion for a non-suit, on the grounds, 1st. That there was no negligence on the part of the defendant, proved; 2d. That there was

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negligence on the part of the plaintiff, proved, which contributed to the injury. The motion was denied, and the defendant excepted. The defendant gave some evidence as to the extent of the injury; also as to the manner of treatment of the injury, by the plaintiff; and as to the condition of the sidewalk as left by the servants of the defendant. The charge of the court is not given. The verdict was for the plaintiff, \$2500.

The defendant's counsel, in his points, claims that the defendant restored the sidewalk in such a manner as rendered travel on it safe, and that it was not negligent; also that the plaintiff was negligent, and especially in traveling along the sidewalk in a dark night, without a lamp or other light.

The evidence touching the negligence of the parties was for the jury. The evidence on the part of the plaintiff, I think, showed very clearly the negligence of the servants of the defendant; and I do not think that the evidence on the part of the defendant made the case much better. By it, it appeared that some of the planks were laid down across the space; that the space between the two west tracks of the railroad (some seven feet) "was not all covered—not more than half covered." The evidence clearly showed that there was a hole left, into which the plaintiff stepped, and that he fell and received the injury.

Whether it was negligence in the plaintiff to walk upon the sidewalk in a dark night, without a light, was a question of fact for the jury, and not a question of law for the court. So, also, as to the treatment of the wounded wrist. It was undoubtedly the duty of the plaintiff to take proper care of the hand and wrist, and, if necessary, to employ a competent surgeon. There was considerable evidence touching the injury, and its treatment, all of which was submitted to the jury; and the question of the negligence of the plaintiff in regard to the injury was for the jury.

The verdict ought not to be set aside on the ground

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that the damages were excessive. The evidence tended to prove a very severe injury, and one probably, in its character, permanent.

The order appealed from should be affirmed, with costs.

DANIELS and TALCOTT, JJ., concurred.

BARKER, J., did not participate in the decision; the cause having been tried before him.

Order affirmed.

[ERIE GENERAL TERM, February 14, 1870. *Marvin, Daniels and Talcott*, Justices.]

GERTRUDE KOLGERS vs. THE GUARDIAN LIFE INSURANCE COMPANY.

After a life insurance policy has become forfeited, by its terms, by the non-payment of premiums, in an action thereon it is incumbent upon the plaintiff to show a receipt of the premium, by some one authorized to receive it, after forfeiture; or to show a ratification of an unauthorized receipt, by the company, by an acceptance of the money with knowledge of the facts, or in some other way.

The fact that a clerk of the insurers had power to bind them by receiving money upon policies, is no evidence of his authority to waive a forfeiture by receiving the premium after a policy has ceased to exist, by reason of nonpayment; especially where it appears that such clerk had always had strict orders to collect no premiums on forfeited policies; and that the company has never received the premiums so collected by him after forfeiture.

In an action upon a policy, the charter and by-laws of the company are admissible in evidence, to show who was authorized to remit forfeitures.

A PPEAL, by the defendant, from a judgment entered upon the verdict of jury.

The action was brought to recover upon a life insurance policy of \$4000, issued by the defendant, upon the joint lives of Albert Kolgers and Gertrude Kolgers, his wife

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(the plaintiff,) payable, on the decease of either, to the survivor.

It appeared in evidence, on the trial, that after the husband had neglected to pay two quarterly premiums, his wife went to the principal office of the company, 251 Broadway, New York, and asked if the premiums had been paid. A clerk named Holley, on examining the books, said the premiums had not been paid, and stated the amount. On her promising to call the next day and pay it, the clerk offered to come to her house to receive it; and he did so, giving the printed receipts of the company, in the usual form, stating the payment as binding the policy for the current quarter. The husband died soon afterwards.

It appeared from the evidence, that before his death the treasurer of the company ascertained that the premiums had been in default, and that the clerk, Holley, had collected them but had not accounted for them, to the company. It also appeared that Holley had been instructed *not* to receive premiums on forfeited policies, and had never before done so.

Holley, being called to account by the company, admitted that he had received these premiums; and the treasurer required him to make his usual report of the collection of the premiums, which report the treasurer received. This was but a short time before the death of the husband. Immediately after his death, the treasurer tendered to the plaintiff repayment of the premium, on the ground that the clerk had no right to receive it, as the time of the policy had expired, when it was paid. The plaintiff refused to receive the premium, and thereupon commenced this action.

On the trial, the court directed a verdict for the plaintiff for the amount of the policy.

———, for the appellant.

Morris & Pearsall, for the respondent.

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By the Court, J. F. BARNARD, P. J. At the time of the payment by the plaintiff to Holley, of the two quarterly premiums, the policy was forfeited, by its terms. It then became incumbent upon the plaintiff, in order to recover upon the policy, to show a receipt of the premium by some one authorized to receive it after forfeiture; or to show a ratification of an unauthorized receipt, by the company, by an acceptance of the money with knowledge of the facts, or in some other way. I think the case fails to show Holley's authority to receive the money after forfeiture. He was a clerk of the defendants, and had been an agent to receive applications for insurance, in New Jersey, which appointment had been revoked. He had been sent by a previous secretary to collect premiums, but always with strict orders to collect none on forfeited policies. Holley signed the receipt for the payment in question as agent for the then secretary. Neither Holley nor this secretary is produced as a witness. If the secretary had the power to waive the forfeiture, he is not proven to have done it. Holley had never done a like act. His power to bind the company, by receiving money on policies on life, would be no evidence of power to waive the forfeiture by receiving the premium after the policy had ceased to exist by reason of nonpayment. The company had never received the premium collected by Holley.

I am unable to distinguish this case, in principle, from an unreported case in this district—*Taylor v. British Commercial Life Insurance Company*. In that case the policy was upon the life of one E. P. Taylor. William Wilson was the agent to receive the premiums. He was instructed, if the premiums were not paid within thirty days, to return the receipt to the general agent in New York. The policy provided that it should be void if the premiums were not paid within thirty days after the same became due. Taylor suffered default for over thirty days. About fifteen days after the policy became forfeited, the assured paid

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the premium to a clerk in the office of the agent, Wilson. Within a few days after this payment, the assured died. The company had never received the money. The clerk in the office of the agent had generally received the premiums for his father, the agent. The court held that William Wilson had no power to waive the forfeiture, or to bind the company by receiving the money, after default; that he was a special agent, and could not exceed his powers as such and bind his principal by his acts, although the assured knew nothing of his limited powers.

In that case the charter and by-laws were admitted in evidence. I think it was erroneous to exclude them in this case. If they did show who was authorized to remit forfeitures, they should have been received. From the testimony of the president of the defendants, I suppose they did.

The rejected evidence, or such parts of it as would show its pertinency, should properly have been presented by the case, so that this court could more satisfactorily determine this point.

I think the judgment, and the order denying a new trial, should be reversed, and a new trial granted; costs to abide the event.

Ordered accordingly.

[SECOND DEPARTMENT, GENERAL TERM, at Brooklyn, September 18, 1870.
J. F. Barnard, P. J., and *Gilbert* and *Tappan*, Justices.]

SPRINGER *vs.* DWYER and MOSSMAN.

An agreement between partners, for a dissolution of the firm, and for a transfer from one partner to the other of the assets of the firm, is a good consideration for a promissory note, given by the latter for the purchase money.

The fact that the purchaser of the assets was induced to enter into the agreement by the false and fraudulent representations of the other partner, respecting the partnership assets, is no defense to an action upon the note by a *bona fide* holder, so long as the agreement stands, and the defendant retains the property transferred, without offering to reassign the same, or demanding a return of the note.

Under such circumstances, however, the maker of the note may maintain an action against the payee, for the fraud; or, in an action upon the note, may set up the fraud as a counter-claim. *Per* INGRAHAM, P. J.

Where the indorsee of a note produces it on the trial, it is to be presumed that he is the holder in good faith, and that he received it before maturity. If the defendant alleges the contrary, the burden of the proof is upon him. A mere denial of ownership, by the plaintiff, a few days after the note matures, will not conclude him, or rebut the presumption of ownership before maturity. *Per* BARNARD, J.

A PPEAL by the defendants from a judgment entered on a verdict.

The action was on a promissory note made by the defendant Dwyer, and indorsed by the defendant Mossman. The note was made and delivered to one Dreyfous, and by him transferred to the plaintiff. The defendants showed that Dreyfous, and Dwyer, the maker of the note, had been partners; that they dissolved on the date of the note, by an agreement in writing, Dreyfous assigning the partnership assets to Dwyer for \$500. The note was given for this purchase money, Mossman indorsing it at Dwyer's request, and for his accommodation. The defendants then offered to show that Dreyfous had made false representations as to the partnership assets, representing that the accounts due the firm were as they appeared on the books, and that no debts had been created, except those appearing on the books; whereas he had drawn \$707 from the bank, which was not entered on the books; had collected over \$500 of the debts owing to the firm

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according to the books, which collections were not entered on the books; had contracted debts against the firm of over \$500, which were not entered on the books, and were not known to the defendant Dwyer. The plaintiff's counsel objected to the evidence, and the court excluded it; to which decision the defendants' counsel excepted. The court thereupon directed a verdict for the plaintiff, for the amount of the note. Judgment was entered, on the verdict, and the defendants appealed.

E. Cooke, for the appellants.

I. The learned judge erred in ruling out the evidence of fraud offered by the defendants. Neither the counsel or the court thought it worth their while to inform us of the grounds of objection to the evidence. The decision, therefore, must be sustained, if at all, on some ground that could not have been obviated on the trial. It will not do now to say that the defense was not properly pleaded; or that the offer did not go far enough; or that the proper foundation had not been laid for it. (*Mabbett v. White*, 12 N. Y. 442, 451. *The Cayuga County Bank v. Warden*, 6 id. 30.)

II. The presumption which the law indulges for the protection of the holder of commercial paper—that he purchased it *bona fide* before it became due, in the ordinary course of trade, without notice, and for value—was rebutted by proving that six days after the note matured the plaintiff said he did not own the note. If he now owns the note, it is because he has bought it since it became due, and subject to all equities and all defenses which could be set up against it in the hands of the payee.

III. That the defense offered would have been available against the note in the hands of Dreyfous, the payee, is distinctly held in a strictly parallel case in this court. (*Barber v. Kerr*, 3 Barb, 149.) In the case cited, the defense was held to be available under the general issue.

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The judgment should therefore be reversed, and a new trial ordered.

S. P. Nash, for the respondent.

I. The alleged representations which the defendants sought to prove would not have constituted a defense to the note. They would only have made a case for a claim of damages against Dreyfous. To avoid the note given in consideration of the assignment of the partnership assets, Dwyer should have offered to rescind the arrangement of dissolution, and replace Dreyfous in his rights as partner. But he retained the property assigned, offering to prove that it was not as valuable as represented. Doing this, he could only defeat the note by showing that he got nothing whatever by the assignment. There must be a want of consideration originally, or a subsequent total failure of consideration, to defeat a contract. The assets of the partnership assigned may have been worth ten times the amount of the note; Dwyer could not retain these and still refuse to pay the note. His remedy, for the false representations, if he retained the partnership transfer, was an action for damages against Dreyfous. (*Nickerson v. Howard*, 19 *John.* 113. *Bellows v. Folsom*, 2 *Rob.* 138. *Curtiss v. Howell*, 39 *N. Y.* 211. *Devendorf, receiver, v. Beardsley*, 23 *Barb.* 656.)

II. The offer to show by oral evidence a verbal agreement made at the date of the agreement of dissolution and of the note, to add to or vary the written instruments, was properly excluded. (*Thompson v. Hall*, 45 *Barb.* 214.)

III. The testimony of the plaintiff's saying that he did not own the note "five or six days after it was due," was not sufficient to defeat a recovery on the ground of his want of title. He produced the note on the trial, and proved its indorsement to him by the payee. Until the defendants showed that some one else had title to it, this was sufficient to authorize a verdict.

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GEO. G. BARNARD, J. This was an action brought by the plaintiff, against the defendants, to recover the amount of a promissory note made by the defendant Dwyer, indorsed by the defendant Mossman, and delivered to one Dreyfous. The case was tried at the circuit, and a verdict rendered for the plaintiff, upon which judgment was perfected. The facts seem to be these: The defendant Dwyer, and Dreyfous, the payee of the note, were partners in business, and on the day the note bears date dissolved that relation, by an agreement in writing, by which, in consideration of the sum of \$500, Dreyfous sold and transferred all his right, title, interest and property in and to the assets, fixtures and effects of the late copartnership, to Dwyer, the latter assuming and agreeing to pay all debts, &c., owing or payable by the said copartnership on the 8th day of September, 1866. In this agreement Dreyfous covenants that he has not created any debt, contract or liability, by which the late copartnership, or Dwyer, could or might be held liable. The note in question was given for the purchase money mentioned in the agreement, the defendant Mossman indorsing it at Dwyer's request. The making and indorsement of the note is admitted; but it is alleged that it was delivered upon the representations of Dreyfous that he had not created any debt or liability for which Dwyer could be made liable, and which representation was knowingly false. And it is further alleged, that the plaintiff purchased the note, if at all, after its maturity.

On the trial of the cause the plaintiff produced the note in suit, and after showing for what it was given, and the indorsement, rested. The defendant sought to prove that Dreyfous made false and fraudulent representations as to the partnership assets, at the time of the making and delivery of the note; and this evidence the court below ruled out. We see no error in this ruling, and feel entirely clear that the court decided rightly in refusing to allow oral evidence or a verbal understanding between the

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parties to the contract, at the time it was entered into, and at the time of the making and delivery of the note, to add to or vary the written instrument. (*Thompson v. Hall*, 45 Barb. 214.)

We are also of the opinion that the court ruled correctly in refusing to allow the defendants to prove that Dwyer took, by the assignment from Dreyfous, less in value than was anticipated or expected. The representations of Dreyfous, in this respect, may have furnished a good cause of action against him at the suit of Dwyer; or the agreement of dissolution might have been rescinded, and Dreyfous restored to his original position as a member of the firm. The agreement therefore stands, and Dwyer still retains all the corpartnership assets, and now, while retaining the property transferred, seeks to avoid the payment of his note, on the ground that the consideration passing to him was not as saleable as represented. This he cannot do. (*Curtis v. Havill*, 39 N. Y. 24.)

The only other point presented by the appellant is as to whether or not the plaintiff is the *bona fide* holder of the note before maturity. On this point we have only to say, that he produced the note on the trial, and it is to be presumed that he was the holder of it in good faith, and that he received it before maturity. The defendant ought to prove that he became the holder after maturity. No proof to sustain this allegation was offered, on the trial, except that the defendant Dwyer testified that the plaintiff denied ownership of the note a few days after its maturity. He was not morally or legally bound to answer this question, and we do not think that his answer, thus made, concludes him, or rebuts the presumption already adverted to. No effort was made to show that Dreyfous or any person, other than the plaintiff, was the owner, or in any way interested in it.

The judgment should be affirmed.

Springer v. Dwyer.

INGRAHAM, P. J. This action is brought to recover the amount of a promissory note given by the defendants on the settlement of a partnership and a transfer of all the assets to the maker of the note. The defense is, that the party receiving the note and executing the transfer of the assets of the firm falsely represented the condition of the books of the firm and the accounts due the firm. Upon the trial, this evidence was excluded, and the defendants excepted. That the false representations were good ground for an action for the deceit, there can be no doubt; but I do not see how they are admissible in this action. Dwyer received from Dreyfous an agreement dissolving the partnership and transferring to him all the assets of the firm. There can be no hesitation in holding that this formed a good consideration. Whether the defendants were induced to enter into this agreement by fraud or not, could not form a defense to the note, unless the defendant Dwyer had previously offered a reassignment of the interest of Dreyfous in the firm, and demanded a return of the note. So long as he held that assignment he held a good consideration for the note, and was bound to pay it. Dwyer might maintain an action for the fraud, but Mossman could not; and so long as the agreement remained in force, the parties remained liable on the note. Dwyer might have set up the fraud as a counter-claim on his part, but he did not.

The evidence was properly excluded. The judgment should be affirmed.

CARDOZO, J., concurred.

Judgment affirmed.

[FIRST DEPARTMENT, GENERAL TERM, at New York, November 1, 1870.
Ingraham, P. J., and Geo. G. Barnard and Cardozo, Justices.]

GOODWIN & CORT *vs.* THE BALTIMORE AND OHIO RAILROAD
COMPANY.

Common carriers are liable in two capacities; one as insurers and one as warehousemen. If an injury happens to goods, from any cause except the act of God or the public enemies, while the carriers are insurers, an action lies against them, by the owners, for damages, and is made out without further inquiry. But if the injury happens after the goods are claimed to have been delivered, the question arises whether the defendants' liability as common carriers, in all its rigor, had, under the circumstances, ceased; and if so, whether the defendants had exercised that care of the property required of them as warehousemen.

Carriers are bound to deliver goods transported by them. Delivery is not effected by placing the property in a position where it cannot be obtained by the owner or consignee.

A quantity of sheet-iron, consigned to the plaintiffs at New York, and transported by the defendants, was unloaded upon the wharf, in New York. The plaintiffs received notice of the arrival of the ship in which the iron was brought, and received a small portion of the iron uninjured. On sending for the remainder, they were unable to get it until some days after it was placed upon the pier, by reason of other freight having been so placed that the iron could not be reached. While it was in this position, it was damaged by rain. *Held* that the defendants were bound to deliver the goods at the usual place, and to deliver them in a conveniently reasonable method for their removal; and that the plaintiffs were bound to exercise reasonable diligence in removing them.

That it was for the jury to determine whether a reasonable time had elapsed after notice of the arrival of the iron, for the plaintiffs to remove it, before it was injured by the rain.

That after the expiration of a reasonable time for the removal of the goods, the liability of the defendants as insurers ceased, and their duty or liability became that of warehousemen, which required that they should exercise over the property, and for its protection, ordinary care and diligence.

That the burden of proof was upon the plaintiffs, to show that the defendants did not use such care and diligence; and if the jury found that negligence was proved, the defendants were liable, even though their duty as common carriers was ended.

And the jury having found a verdict for the plaintiffs; *Held* that it was sustained by the evidence; and the judgment entered thereon was affirmed.

A PPEAL by the defendant from a judgment entered upon the verdict of a jury, and from an order denying a motion for a new trial.

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The action was brought against the defendants as common carriers, to recover damages resulting to the plaintiffs through the negligence of the defendants, whereby a lot of sheet-iron consigned to the plaintiffs became wet and rusted before it was delivered to them, and while it was on the pier, (No. 13, N. Y. city,) where it had been placed by the defendants from their vessel while she was discharging her cargo, in September, 1865; and also for the recovery of \$29.54, the value of three bundles of iron, admitted to have been lost by the defendants.

The action was tried before Justice CARDOZO and a jury. The facts appearing upon the trial, as claimed by the plaintiffs, were as follows: The plaintiffs are importers and dealers in metals at No. 245 Water street, N. Y. city. In August, 1865, three several lots of sheet-iron, amounting to 650 bundles, were delivered to the defendants at Wheeling, Va., to be transported to the city of New York, and there to be delivered to the plaintiffs, to whom the iron was consigned. The iron was carried from Wheeling to Baltimore by rail, from whence it was transported to New York city by steamships belonging to the defendants. 559 bundles of the iron were shipped on board the steamship *Carrol*, which arrived at Pier No. 13, New York, September 5th, where she lay about a week, discharging her cargo, and taking in another. The rest of the iron was shipped on the *Alleghany*, which arrived about six or eight days after the *Carrol*. Three bundles of the iron were lost. Eleven bundles were delivered by mistake to J. Dickinson & Co., and about three weeks afterwards received by the plaintiffs, while about two-thirds of the entire shipments of iron became rusted and damaged in consequence of becoming wet by a rain storm, while lying upon the pier, before the plaintiffs had an opportunity of taking the same away. Upon receiving notice of the arrival of the *Carrol*, September 5th, the plaintiffs immediately sent their cartman (Beekman) to the ship to get the iron. On that day

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the cartman did not get any; there being none out of the vessel. The plaintiffs continued to send him, and finally he got a small portion of the iron on the 6th or 7th, about twenty bundles, which was not damaged. The plaintiffs continued to send their cartman daily, two or three times a day, with a double truck and two single carts, to get the rest of the iron, but he was unable to get any more until about the 11th of September, owing to the fact that the remaining portion of the iron, when discharged from the vessel, was placed at the extreme end of the pier, and the entire width of the pier was covered with hogsheads of tobacco, discharged from the *Carrol*, and which, as the plaintiffs claimed, completely blocked the passage-way between the iron and the head of the pier, and rendered it impossible for carts to get to the iron lying at the other end of the pier.

The facts in respect to the landing of the iron were claimed to be as follows, viz: The small portion which was taken away by the plaintiffs' cartman on the 6th or 7th of September, was placed opposite the ship, pretty well up the dock, towards the bulkhead. The rest of the iron, being the greater portion, was placed at the extreme end of the pier, touching the string-piece, towards the river. In front of this iron, that is, between the street and the outer end of the pier, the defendants' agents placed a large number of hogsheads of tobacco which were taken from off the *Carrol* while she was discharging her cargo, which hogsheads were so placed as to extend across the width of the pier, about four tiers back. This obstruction continued for several days, rendering it impossible for a cartman to reach the iron at the end of the pier with his cart, until the 10th or 11th of September, when a passage-way was made for carts by rolling away some of the hogsheads of tobacco; and one of the defendants' agents went to the plaintiffs' store and notified them of the fact, and that they could get the iron. Their cartman removed it to their

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store, on the 10th or 11th of September. While the iron thus lay on the pier, a heavy rain came on and wet the iron, which caused it to rust, and greatly damaged it. The iron was placed at the lower end of the pier, where the water which made upon the dock ran down into the iron; and although the defendants' agents placed thin boards under the iron, and covered it with tarpaulins before the rain, yet the covering was insufficient to keep it dry—it was only partly covered, and the dunnage, or thin pieces of boards which were placed under it, were not thick enough to prevent the water on the dock from running into it. The evidence showed that the iron was damaged from two to two and a half cents per pound, and it was claimed that it would be seen by computation that at the lowest estimate which could be made from the proof, the actual damages exceeded the amount of the verdict.

At the close of the testimony the learned judge submitted the whole case to the jury upon the questions of fact involved, in regard to which there was some conflicting evidence, instructing them as follows :

“The plaintiffs seek to recover from the defendants, who are common carriers of goods for hire, the value of three bundles of sheet-iron, which were lost while in the defendants' charge; and the damage which, they assert, a large number of bundles of sheet-iron consigned to them, suffered by the negligence of the defendants. So far as the loss of the three bundles is concerned, no dispute is made as to the liability of the defendants; and as the evidence is uncontradicted that their market value amounted to \$29.54, for that sum, in any event, the plaintiffs will be entitled to recover.

As to the injury to the rest of the iron, the plaintiffs claim that about two-thirds of the whole consignment of 559 bundles, which would be about 373 bundles, equal, upon the evidence, to 48,490 pounds, was damaged to the

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extent of two cents per pound; and as there is no conflict upon the amount of the damage—if the defendants be liable at all under the rules of law, which I shall give you—you will find no difficulty in calculating the amount of your verdict. But, in any event, in the whole, under the pleadings in this case, it must not exceed \$659.

The defendants, being common carriers of goods for hire, are responsible by the common law as insurers of the property against everything, except the act of God and the public enemies, until their obligation and duty as such carriers terminated; as to that, no one connected with the case doubts. The question disputed by the learned counsel for the defendants is, "when did the duty of the defendants as common carriers cease?" Upon that subject, I charge you that that extent of duty and liability continued upon the defendants until the expiration of a reasonable time after notice to the consignees of the arrival of the iron, for the latter to remove it from the possession of the defendants; and during the period, until such reasonable time had elapsed, the plaintiffs were under no duty, except to proceed with due and reasonable diligence to remove the property, and that of course includes a duty upon them to endeavor, by all reasonable exertion, to reach and remove the goods, whatever obstructions there were. Whatever you think was reasonable, under all the circumstances in that respect, the plaintiffs were bound to do. The defendants were bound to deliver the goods at the usual place, which they did, and they were bound to deliver them in a conveniently reasonable method for their removal, and the plaintiffs were bound to exercise reasonable diligence for their removal from such place. But just here arises the important question of fact for your determination, which I leave exclusively to you, namely: Had a reasonable time elapsed before the rain which injured the iron, after notice of its arrival, for the plaintiffs to remove it? The term "reasonable time" must depend

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upon the circumstances, the character of the property to be removed, the condition of the pier, and all such like matters. You must first consider what was the condition of the pier. Was it so obstructed by the other freight that the plaintiffs, by reasonable care and diligence, could not reach and remove their goods, as they claim, or was it, as the defendants insist, in such condition that the cartman could get to and remove his goods by taking his stand among the other cartmen and waiting his regular and reasonable turn, as they claim the others did? Because, of course, what would be a reasonable period to remove the goods if the pier were wholly unobstructed, or if, as the defendants claim, there was at all times a passage, or, as the witnesses say, a "gangway," open sufficiently for the carts to pass to and fro, would be very different from what would be necessarily required, and, therefore, reasonable for that purpose if the pier were, by the arrangement of other freight, so filled up and obstructed that it was impossible, for days at a time, to get to the spot where the defendants chose to place this iron. The testimony, conflicting as it is upon these matters, is especially your province to consider and weigh; and, reviewing it all, it will be for you to say, whether a reasonable time, after notice for the removal of the iron, circumstanced as you find it to have been on this pier, had expired, before the happening of the storm which occasioned the damage, which it is not disputed the iron suffered. If it had, then, as to so many bundles, or all, if you find such to have been the fact as to the whole, as could have been removed before the storm, the defendants' duty as common carriers ceased. But if you find that such a reasonable time had not expired, or had not expired as to all the iron, then, as to so many bundles as it had not expired, the duty and liability of the defendants as common carriers remained, and for the damage to that number of bundles they would be liable. But if you should be of opinion that, as to all

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or any of the iron, a reasonable time for its removal had expired before the storm, still some duty rested upon the defendants. Their liability as insurers ceased; but they were bound, nevertheless, to exercise some duty as respects the property, until the plaintiffs had actually removed it. From the time that the reasonable period for the removal of the goods expired, the defendants' duty or liability became that of warehousemen, which required that the defendants should exercise over the property, and for its protection, ordinary care and diligence, which means that degree of care which persons of ordinary prudence would usually take of such property. And if you find that the period of time had elapsed, which, as I have explained to you, would convert the liability of the defendants from that of insurers to that of warehousemen, then it rests with the plaintiffs to satisfy you upon the evidence that the defendants did not take that care of this property which persons of ordinary prudence would usually take of such goods, the burden of proof of negligence being then on the plaintiffs. If you reach this branch of the case, you will say whether the plaintiffs have proved that degree of negligence against the defendants. If they have, the defendants will be liable, even though their duty as common carriers was ended.

These views cover all the instructions which I think the case demands, to enable you to reach a proper verdict, and I leave the case to you."

To this charge, and each and every portion thereof, the defendants excepted severally.

The defendants' counsel asked the court to charge that it was the duty of the plaintiffs, after the goods were placed on the wharf, to have used proper and reasonable precautions to protect them while lying there. The court refused so to charge; to which refusal the defendants' counsel duly excepted.

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The jury rendered a verdict for the plaintiffs, and assessed their damages at \$659.

A motion was made by the defendants, upon the judge's minutes, for a new trial, which was denied; and thereupon judgment was entered upon the verdict; and the defendants appealed.

John Slosson, for the appellants.

I. The rule laid down by the judge in his charge to the jury in respect to the continuance of the defendants' liability as carriers, was not, it is submitted, the correct one, and though in some respects the charge on that head may be unobjectionable, taken as a whole, it was calculated to mislead the jury. The rule as thus laid down was this: That the special liability of the carriers continued until the expiration of a reasonable time after notice to the consignees of the arrival of the iron, for the latter to remove it; that until such reasonable time elapsed, the plaintiffs were under *no duty*, except to proceed with reasonable diligence, and by all reasonable exertions to *remove* the property; that it was for the *jury to say*, what exertions, under all circumstances, the plaintiffs were bound to make; that the goods were to be delivered in a conveniently reasonable method for their removal, and that what was a reasonable time within which to effect the removal, must depend upon the circumstances, the character of the property, "the condition of the pier, and all such like matters;" of all which the jury were to judge. Nor is the objection to the charge lessened by the manner in which the judge explained his views, viz., that "what would be a reasonable period, if the pier were wholly unobstructed, or if there was, at all times, a passage-way to the iron, would be very different if the pier were, by the arrangement of other freight, so filled and obstructed that it was impossible, for days at a time, to get to the spot where the defendants chose to place this

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iron." It may be remarked, in passing, that the evidence wholly fails to justify the use of such strong expressions as those italicised, and they were unquestionably calculated to give the jury the impression that in the opinion of the court there was evidence which would justify them in finding, that for *days together* there was *no possibility* of reaching the spot where this iron was placed; whereas all the evidence shows, that the displacement of a few hogsheads was all that was necessary to make an unobstructed passage at any time, to the iron. It is not difficult to see that under such a charge, a verdict for the plaintiffs was inevitable, for it was telling them, almost in terms, that notwithstanding the iron had been safely landed on the wharf, according to custom, (which is not disputed,) and notice of the arrival given to the plaintiffs in due time, no duty devolved upon the plaintiffs to look after and protect the iron, until it could be removed, nor to do anything more than the jury might think reasonable for the purpose of removing any hogshead or hogsheads, that stood in the way of the iron, which obstruction they were told, if they believed the plaintiffs' witnesses, amounted to an "impossibility for days at a time to get to the spot" where the iron lay, and that if the jury should think it unreasonable for the plaintiffs to do anything in the way of removing such obstacles, (which the verdict clearly shows they did, for there is no pretense that the plaintiffs made the least effort in that regard,) the extraordinary liability of the defendants as common carriers continued, until there was a perfectly unobstructed passage for the plaintiffs' carts to reach the iron. No reported case goes to anything like this extent. It continues the liability of the carrier as an insurer, after he has done everything possible for him to do in the way of a safe and convenient delivery, (for it will be remembered that there is not a particle of evidence to show that the tobacco could have been disposed of in any other way, on the pier, than it actually

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was disposed of,) and it relieves the consignee of all obligation to protect, or take care of his goods, until every obstacle in the way to them is removed.

Here was a pier, or wharf, only about thirty-one feet wide, according to the diagram, by three hundred and twenty-one feet long. Three other vessels, besides the *Carrol*, were discharging and receiving cargo; the iron was landed in the customary way; the hogsheds occupied only the space which the rules and regulations governing the distribution of cargo on the pier allowed. Three other vessels who were receiving and landing cargoes were entitled to their shares of the pier, and one hundred carts were coming and going, bringing and taking away merchandise all the time. To hold that the owners of the *Carrol* (and the same rule would apply to each of the other three vessels) remained liable as insurers of each and every article discharged from their vessel on that dock, until a free passage-way to them was made, so that each could be "conveniently" got at, seems to me, with great respect to the learned justice, and his really able charge, to be carrying the doctrine to a very great, and practically to a very dangerous extent. The plaintiffs knew, as well as the defendants, the condition of trade at this wharf, and the extreme difficulties attending the arrangement of a great mass of merchandise on so narrow a pier, and were bound to accept the condition of things, and to govern themselves accordingly.

The true rule, I apprehend, is this: That the contract of the carrier is completed, when notice has been given to the consignee, of the arrival of the goods, sufficient to give him a fair opportunity to provide suitable means to assume the care of and carry them off, and when they are safely landed on the wharf, in the usual and customary way. This notice is in lieu of personal delivery, and when that is given, and a reasonable time allowed the consignee to take possession of his goods, either for re-

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moval, "or to put them under proper care and custody," as it is expressed in *Richardson v. Goddard*, cited below, the delivery is complete. After that, the goods are at the risk of the consignee; he is bound, if he cannot immediately remove them, to protect them; he cannot be idle and do nothing, and the carrier remain responsible as such, until he can get convenient access to the merchandise. Any other rule would be uncertain, indefinite, and liable to the greatest abuse in the hands of a jury, and would be detrimental to commerce, especially in a city like New York. (*Ang. on Carriers*, §§ 313, 315. *Fisk v. Newton*, 1 *Denio*, 45. *Richardson v. Goddard*. 23 *How. U. S.* 39. *Miller v. Steam Navigation Company*, 6 *Selden*, 438. *Ely v. New Haven Steamboat Company*, 53 *Barb.* 214, 215. *Price v. Powell*, 3 *Comst.* 322. *Flanders on Shipping*, § 275.) In the case of the ship *Grafton*, (*Olcott's U. S.* 43,) the court says: "By the established course and custom of trade in New York, goods or freight may be delivered at the wharf, and need not be tendered personally to the consignee. A delivery of the cargo on the wharf in New York, with notice of the time and place of unloading, places the goods at the risk of the consignee, and discharges the ship from liability." After receiving notice, the consignee "is bound to provide suitable persons to take care of the goods and carry them away." (*Story on Bailm.* § 545, citing 4 *Pick.* 371. 1 *Rawle*, 203.) In *Richardson v. Goddard*, above cited, Justice Grier says: "To constitute a valid delivery on the wharf, the carrier should give due and reasonable notice to the consignee, so as to afford him a fair opportunity of providing suitable means to remove the goods, or put them under proper care and custody." And in *Roth v. Buffalo and State Line Railroad*, (34 *N. Y.* 553,) the court says: "The owner ought not to be permitted to prolong the strict and rigorous liability of the carrier, by refusing or neglecting to receive his baggage for an unreasonable length of time after the

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transit is ended. The obligations of both parties are, to some extent, reciprocal."

It does not relieve the charge on this subject, of the objections thus urged against it, that the learned judge told the jury that the duty of the plaintiffs to remove the goods "included the duty to endeavor, by all reasonable exertion, to reach and remove the goods, whatever obstructions there were;" for in the next sentence he tells them that, "whatever they (the jury) should think was reasonable, under all the circumstances, the plaintiffs were bound to do;" and, of course, were bound to do nothing more. So that the question of the defendants' continued liability as insurers of this iron is made to depend on what exertions a jury might think the plaintiffs ought to make, to remove a few hogsheads out of the way; and if they should happen to think that, under the circumstances, no exertion at all was reasonably required, (as they certainly did in the present case,) then the carriers' liability continued.

II. The learned judge erred in refusing to charge the ninth and tenth requests of the defendants. The ninth request was that "under the evidence the defendants were under no obligation to put the iron *in a warehouse*." The tenth request was that "the covering of the iron by the stevedore, as proved, was all the duty which, under the circumstances, as proved, the defendants owed to the plaintiffs' iron after it was put on the dock." The verdict being general, the court cannot say whether the jury found that a reasonable time in which to take away the iron had not expired, and that the defendants were, therefore, still liable as common carriers, or, that having expired, the defendants had failed in performing their duty, in respect to the care and protection of the iron, while in their possession. It is therefore important to ascertain whether the ruling on the latter head may not have misled the jury. Assuming that the verdict may have turned on the

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latter point, the question is, what degree of care did the law exact of the defendants, under the circumstances, as proved? The facts were these: Just before the storm, on Friday, Willetts, the receiving and delivery clerk, apprehending a rain, asked the plaintiffs' cartman to go to the plaintiffs' and get tarpaulins. He said he would be d—— if he would. This is not contradicted. Willetts then himself went on board the *Carrol* and got a supply of canvas, and sent and got tarpaulins from the store (plaintiffs') and had the iron covered up. All the iron was covered. Dickinson & Co., whose iron lay near by the plaintiffs', covered their own iron. Goodwin, the plaintiff, himself swears that it was his custom, when a large quantity of tin plates arrived for him from an English port, so that he could not carry it all away in one day, to send down and cover the plates with tarpaulins, to guard against the contingency of rain; and when asked why he did not observe the same precaution in respect to this iron, his only answer was, "We had not possession of the iron; we could not get at it; we had no control over that iron; we did not consider it our duty; we wanted to ride the iron away;" and when asked if he meant to say "whether he could not have sent down and covered that iron on any day after he received notice," he answered, "I do not say I could not—it was a possible thing to do." That it was done by the defendants, is not only proved by two witnesses, but that it was done, and could be done without the least difficulty, is manifest from the testimony on both sides.

The question then is: Did the defendants do all they were bound to do in the way of protecting this iron, when, on the plaintiffs' refusal to cover it, they themselves sent and covered it with tarpaulins? The court will observe, that this is not the case of an absent or unknown consignee, or one who could not be found, or one who refused to receive, but of a consignee, who not only was present, but had actually taken away a portion of this

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very shipment of iron, and refused to cover the residue, when apprised of the coming storm. What are the duties and liabilities of the carrier under such circumstances, supposing his extraordinary liability as carrier to be ended? We cited authorities under the previous point, to show that after reasonable notice and landing of the goods, they were at the risk of the consignee; but suppose some duties and liabilities to remain in the carrier, what are they? We answer, the duties and liabilities only of a mere gratuitous bailee—a bailee without compensation. In the case of *Roth v. Buffalo and State Line Railroad Company*, (34 N. Y. 548,) this duty is stated to be that of “a mere bailee in deposit, gratuitously or otherwise, according to circumstances—liable only for losses occasioned by his own fault.” In *Goold v. Chapin*, (20 N. Y. 267,) it is held that “where the carrier is not able, with due diligence, to find any one to receive the goods in behalf of the owner, and there is no safe place of deposit within his reach, his duty as carrier is at an end, and he then becomes a *mere ordinary bailee*.” And then, speaking of the duty of depositing in the carrier’s own warehouse, (or any other, of course,) the court says: “That, however, can only be where there has been a failure by the owner or his agent to receive the goods.” If it was the duty of the defendants to deposit this iron in a warehouse, as the refusal of the judge to charge the ninth request implies, and left the jury to infer, when did that duty arise? As clearly on the first day the iron left the ship, as on the last, and under the law as laid down to the jury by the court, the defendants were in fault in not sending the goods to a warehouse, from the moment the hogsheads were landed, (under the direction of a stevedore, be it remembered, who was limited by the rules and regulations of the dock, to a certain space,) and it was discovered that a cart could not be backed up to the iron itself, without removing a few of the intervening hogsheads of tobacco. The rule as laid down in *Miller v.*

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Steam Navigation Company, (10 N. Y. 438,) is the true one, in respect to storing goods after arrival. "So when goods are safely conveyed to the place of destination, and the consignee is *dead, absent or refuses to receive*, or is not known, and cannot, after due efforts are made, be found, the carrier may discharge himself from further responsibility, by placing the goods in store with some responsible third person in that business at the place of delivery, for or on account of the owner," and it is confidently asserted that these are the only cases in which the carrier has a right to send the goods to a warehouse, and subject the consignee to additional charges. The rule, as laid down in the case last cited, is in the very words used by the court in *Fisk v. Newton*, (1 Denio, 45.) *Angell*, in his treatise on *Common Carriers*, (§ 291,) adopts the case of *Fisk v. Newton* as the correct exposition of the law on this subject, and so does *Flanders*, in his treatise on *Shipping*, (§ 276,) and to the same effect is *Ostrander v. Brown*, (15 John. 39.)

We think it quite clear, then, that whatever duty these defendants owed to the plaintiffs' iron on the termination of their obligations as carriers, it was not to send the articles to a warehouse; indeed to have done so, under the circumstances, would have been a gross breach of duty, and the plaintiffs might well have treated it as a refusal to deliver, or perhaps a conversion, and we insist that the refusal to charge the written request was erroneous; and that the court cannot say that the verdict may not have turned on that very point, to wit, the defendants' omission to send the iron to a warehouse. What, then, under the facts, was the duty of the defendants, treating them as mere gratuitous bailees? The rule as to gratuitous bailees is, that they are responsible only for gross or culpable negligence. (*Jones on Bailm.* 8. *Tompkins v. Saltmarsh*, 14 *Serg. & R.* 275. *Angell on Carriers*, § 323.) The bailment is gratuitous if the bailee is not to be paid for his care and custody. (*Angell on Carriers*, §§ 17, 304, 295.) "Where the under-

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taking is gratuitous, and the party has acted *bona fide*, it is not consistent either with the spirit or policy of the law, to make him liable to an action." (*Shiells v. Blackburne*, 1 H. Black. 158.) In determining what degree of care a gratuitous bailee is bound to exercise, regard must be had to the nature and quality of the article intrusted to his care, and the dangers to which it may be exposed. (*Ang. on Car.* § 26.) The article was iron, in sheets, difficult to be moved, and not liable to be stolen; the only protection necessary was, to cover it, to guard it against rust from rain; this was, as we contend, the plaintiffs' duty; but, on their refusal to perform it, the defendants owed them no greater or higher duty. It certainly was not *gross negligence* in them, to do all they could to protect this iron against the effects of a sudden shower, after the plaintiffs had refused to do anything. Had the iron belonged to the defendants, what more could they have done than they did? And this was the rule of diligence given by the judge. They did exactly what the plaintiffs themselves always did in respect to their cargoes of tin when lying on the wharf, and the defendants could not be asked to do more than the plaintiffs themselves always did. The test question on this head is, did the defendants act *bona fide* and with all the prudence which, under the circumstances, they were called upon to exercise? And how can it be contended for a moment that they did not? Under such circumstances, to leave it to the jury to say, whether the defendants had failed in their duty, by not sending the iron into a warehouse, or by not doing something else which they did not do, was, we respectfully submit, erroneous, and calculated to mislead.

III. The judge charged the jury that it was the plaintiffs' duty "to endeavor, by all reasonable exertions, to reach and remove the goods, whatever obstructions there were." Assuming, for the present purpose, that the judge was right, in holding that the extraordinary liability of the defendants as common carriers continued until a reasonable

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time had elapsed, after notice to the plaintiffs, to enable them to take the iron away, and that it was the duty of the plaintiffs, as charged above, to use every reasonable exertion to reach and remove the goods, whatever obstructions there were, (which latter proposition cannot be disputed,) the evidence wholly fails to sustain the verdict. Taking the plaintiffs' own evidence, and applying the judge's rule, that it was the plaintiffs' duty "to endeavor by all reasonable exertions to reach and remove the goods, whatever obstructions there were," and it is manifest that by an effort which could not have been a very serious one, these hogsheads could have been removed—rolled on one side, so as to give access to the iron; and the only ground on which the verdict, on this evidence, can be sustained, is that the plaintiffs were under no obligation to make any effort whatever to remove the intervening obstacles, but had a right to wait until every impediment had been got out of the way by others, and this, too, on a dock crowded with freight not only from the *Carrol*, but three other vessels; a proposition which, if sustained, extends the liability of the carrier *as an insurer* to a most extraordinary and indefinite extent; and, as we submit, beyond any legal limits known to the profession. With this extra exertion the whole iron could have been removed in one day.

I maintain that this verdict cannot stand, on the plaintiffs' own evidence, under the instructions of the judge, as quoted above, in respect to the plaintiffs' duty. If, in connection with this, we take the defendants' testimony, that at the time of the rain three-fourths of the hogheads had already been taken away; that there was no obstruction, so that a cart, taking its regular course, could get to the iron, and that carts were all the time passing down to the extreme end of the *Carrol*, (which would bring them to the extremity of the pier,) receiving freight and bringing freight there; that Willetts, the receiving and delivering clerk of the ship, showed the plaintiffs' cartman (and

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this is uncontradicted) "the way, several times, by which he could get the iron," and urged him several times to go and get the iron, and "there were times when he came there without any trucks with him;" that the cartman told Willets that he could go and get his iron if he could take his turn, which is not contradicted; it makes, we submit, a clear case that the plaintiffs were altogether inexcusable for permitting their iron to remain so long. Is it a proposition to be tolerated, that a party may allow his merchandise to lie on an exposed wharf four or five days, after it has been landed in the usual and customary manner, and after notice that it is so landed, and that he is expected to come and take it away, and never himself go near it, but content himself with reports from his cartmen; when, by a little, or even a considerable effort, all obstacles could have been removed; and thus remain passive and indifferent until a casualty occurs, and then claim that the carrier had never completed the delivery of the merchandise, because some obstructions lay between it and a free passage from the streets; and that this extraordinary liability continued until the owners of the hogsheads had removed them all out of the way? Is this the doctrine of a delivery on the wharf of a great commercial city like New York, after notice to the consignee, as laid down in all the cases?

M. L. Townsend, for the respondents.

I. It was the province of the jury to pass upon the questions of fact presented by the evidence in the case, and their verdict upon those questions is final.

II. The testimony fully justified the jury in finding the following facts: 1st. That the iron which was injured by the water was placed by the defendants' agents, when discharged from the *Carrol*, at the lower end of the pier, and that the pier was so blocked up and obstructed by hogsheads of tobacco, placed there by the defendants' agents,

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from the same vessel, as to render it impossible for the plaintiffs' cartmen to get the iron, until after the rain storm. 2d. That the plaintiffs used all reasonable means to get the iron away, by daily, and several times each day, sending their cartmen to get the iron, from the time they received notice of its arrival, until after the storm. 3d. That the iron was not properly covered by the defendants' agents, in order to protect it from the rain; nor was proper *dunnage* placed under it, to prevent the water which ran down the pier from running into it, in consequence of which it became rusted and injured. 4th. That the damage to the iron, at the lowest estimate, exceeded the amount of the verdict.

III. The plaintiffs had a *reasonable* time, in view of all the circumstances, after notice of the arrival of the iron, to take it away; and it was the duty of the defendants to have placed the iron in such a condition as that the plaintiffs could, by ordinary and reasonable efforts, obtain it. And what was *reasonable*, was solely for the jury to determine, under all the circumstances. (*Story on Bailments*, § 509. *Angell on Carriers*, §§ 284, 287, 303. *Price v. Powell*, 3 N. Y. 322. *Clendaniel v. Tuckerman*, 17 Barb. 184. *Lamb v. Camden and Amboy Railroad and Tr. Co.*, 2 Daly, C. P. 454.) 1. The duty of carriers, as laid down by Judge Story, is, "to safely and securely carry the goods to their place of destination, and there to deliver them, in a reasonable time and in a reasonable manner." "It is not sufficient to carry the goods to their place of destination, and then place them on a wharf, but due notice should be given to the consignee, of their arrival, and the goods placed in safe custody, so that they may, upon such notice, remove them in a reasonable time." (*Story on Bailments*, § 509.) 2. The arbitrary rule contended for by the defendants, viz., that their duty ceased when they had placed the goods upon the wharf, and given notice, is neither law nor common sense. The goods must be placed in a

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safe condition, and where they can be got at by the consignee in a reasonable time, by the use of ordinary means. To place heavy bundles of iron at the end of a pier, and then block up the pier with a ship's cargo, as in this case, so that the iron could not be reached with a cart, is not a delivery. So far as the plaintiffs were concerned, the iron had better have remained in Wheeling, from whence it came, or in the ship's hold, where it would have kept dry.

IV. If the defendants' liability as *insurers* had ceased before the iron was actually received by the plaintiffs, their liability as depositaries or warehousemen immediately attached, and continued until the iron was removed by the plaintiffs, after the storm, and as such the defendants were bound to take ordinary care of the property. (*Story on Bailm.* §§ 444, 448 to 450, 452, 454. *Ostrander v. Brown*, 15 John. 43. *Goold v. Chapin*, 20 N. Y. 259. *Clendaniel v. Tuckerman*, 17 Barb. 184. *Lamb v. Camden and Amboy Railroad and Tr. Co.*, 2 Daly, 454.) Judge Story defines the liability as follows: "If the consignee is unable, or refuses to receive the goods, the carrier is not at liberty to leave them on the wharf, but it is his duty to take care of them for the owner." (*Story on Bailments*, § 544.) 1. The court properly left the question to the jury, charging them "that if the defendants did not take that care of the property which persons of ordinary prudence would usually take of such goods, they were liable;" and also instructing them that the burden of proof was upon the plaintiffs to establish the fact. 2. We have already shown that the defendants did not sufficiently cover the iron, nor place proper *dunnage* under it, in order to keep it from getting wet, and the finding of the jury is conclusive upon the question of fact.

V. The concise and able charge of the learned judge embraced all the law, upon which it was the duty of the court to instruct the jury, and none of the exceptions to the charge, or to the refusals to charge as requested, are

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well taken. The propositions of law contained in the charge dispose of all these exceptions, as well as the exception to the refusal of the court to dismiss the complaint.

By the Court, GEO. G. BARNARD, J. This action was brought to recover \$650. This amount was made up of two items: one for three bundles of sheet-iron lost by the defendants, who had received it as common carriers, and had failed to deliver it, amounting to \$29.54; the other was a claim for damages sustained by the plaintiffs by reason of injury caused by the defendants to other bundles of sheet-iron which the defendants had also received as common carriers, to be delivered to the plaintiffs in New York. As to the first item, no question can be made; the loss is proved, and the defendants' liability established. As to the remaining clause, the evidence established that the iron was unloaded upon the wharf in New York; that the plaintiffs received notice of the arrival of the ship in which the iron was brought; that they sent for their goods, and got a small portion uninjured; they sent for the remainder, but were unable to get it until some days after it was placed upon the pier, by reason of other freight having been so placed that it was impossible to reach the property in question; while it was in this position it was damaged to the extent claimed by the plaintiffs, by rain. Common carriers are liable in two capacities; one as insurers, and the other as warehousemen. If the injury happened while the defendants were insurers, the action is made out, without further inquiry. But the property was unloaded and upon the pier; it had been, for five days. The defendants were bound to deliver. Delivery is not effected by placing the property in a position from which it cannot be obtained by the person to whom delivery is to be made. It thus became a nice question whether the defendants' liability as common carriers, in all its rigor, had, under the circumstances, ceased, and if so, whether

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the defendants had exercised that care of the property required of them as warehousemen. The judge at the circuit laid down, with eminent fairness and accuracy, the dividing line between the two liabilities, and the principles governing each. The jury have found for the plaintiffs.

Upon the merits, I am of the opinion the verdict is sustained by the evidence, and that the judgment should be affirmed, with costs.

Judgment affirmed.

[FIRST DEPARTMENT, GENERAL TERM, at New York, November 1, 1870.
Ingraham, P. J., and Geo. G. Barnard and Cardozo, Justices.]

GRUND & CERRERO vs. J. F. and C. H. PENDERGAST.

The rule of damages which prevails in an action for the breach of a contract to transport goods from one place to another, where the owner is unable to procure the goods to be carried in any other manner, does not apply when, upon the failure of the carrier to perform, the owner of the goods can send them by another conveyance.

In such a case the owner must send the goods by another conveyance; and if he does so, he will be entitled to recover the difference between the price at which the defendants undertook to carry the property, and the price which the owner was compelled to pay, for its transportation.

The rule as to the form of the judgment, laid down in *7th Wallace's Rep.* 258, is not binding on the state courts, and is not the correct one, but simply leads to great inconvenience, without any practical advantage.

THIS is an appeal from a judgment rendered for the plaintiffs on the report of a referee.

The action was to recover damages for the breach of a contract to carry petroleum on the deck of the bark *Contest*, from New York to Cadiz, at \$1.75 per barrel, payable in gold. The referee found the following facts, viz: That on the 24th day of October, 1865, the defendants entered into a contract with the plaintiffs to carry, on freight for them

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on board the bark *Contest*, then lying in the port of New York, one hundred and eighty-five barrels of petroleum, and deliver the same at Cadiz, in the kingdom of Spain, at the price of \$1.75, gold, per barrel, at twenty reals vellar to the dollar, to be paid at Cadiz upon the delivery of the said petroleum. That on or about the 4th day of November, 1865, the defendants gave notice to the broker, through whom the contract had been made, that the bark *Contest* was ready to receive the said petroleum on board, and the broker on the same day informed the plaintiffs thereof. That on the 8th day of November, 1865, and within a reasonable time after the said notice was so given, the plaintiffs tendered and offered to deliver the said petroleum on board the *Contest*, but the officers in charge of the said bark refused to receive the same on board, and the plaintiffs on the same day notified the defendants thereof, and insisted upon the fulfillment of the said contract, which the defendants refused. That the bark *Contest* sailed from the port of New York for Cadiz on or about the 10th day of November, 1865, without receiving on board the said one hundred and eighty-five barrels of petroleum. That the plaintiffs subsequently, and on or about the 20th day of November, 1865, shipped the said one hundred and eighty-five barrels of petroleum to Cadiz on freight for hire on board the bark *Young Rover*, at the price of \$4 per barrel in gold, together with five per cent primage, payable in gold, at the rate of twenty reals vellar to the dollar, payable at Cadiz, on the delivery of the said petroleum. That the said bark *Young Rover* was the only vessel in the port of New York offering or willing to take the said petroleum on board as freight after the sailing of the bark *Contest*. That the difference between the agreed rate of freight by the *Contest* and the freight actually paid for the said petroleum on board the *Young Rover*, computed in the currency of the United States, including

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exchange, was \$793.65, which sum was paid therefor by the said plaintiffs on the 19th day of March, 1866.

The referee's conclusion of law was, that the plaintiffs were entitled to judgment in their favor against the defendants, for the said sum of \$793.65, with interest thereon from the said 19th day of March, 1866, besides their costs, and a suitable allowance to be fixed by the court.

E. P. Wheeler, for the appellants.

I. The true rule of damages for the breach of a contract to carry freight is the market value of the goods at the port of destination, less their value at the port of shipment, with the freight added. (*Bracket v. McNair*, 14 John. 170. *Amory v. McGregor*, 15 id. 23. *O'Connor v. Foster*, 10 Watts, 418.) If there be any exception to this rule, it is of the case where, there being a regular mode of conveyance between the two ports, another conveyance of the same sort as that stipulated by the contract can be procured at a regular market rate. The only reason for introducing such an exception would be to require the shipper to use ordinary diligence to get another conveyance, and prevent his speculating at the owner's expense. In such a case, the rule of damages contended for by the plaintiffs, to wit, the difference between the market rate of freight and that agreed to be paid, has an apparent equity. The shipper gets the equivalent of what his contract calls for, and the rule is fixed and definite. But in the case at bar, the rule suggested has no application.

1. The plaintiffs got more than the defendants agreed to give them. Their petroleum was carried under deck at a saving of \$120 insurance, and at a greatly diminished risk.
2. To obtain this advantage, the plaintiffs paid twice the market rate. The testimony to this point is uncontradicted. If they could obtain this advantage at the defendants' expense, they might have chartered the *Great Eastern* to take their petroleum. Once concede that the

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law allows them to obtain any advantage they choose at the defendants' expense, and there is no limit to the extortions and injustice that might be practiced. The plaintiffs are in this dilemma: Either they could get their petroleum carried in the way the defendants agreed, or they could not. If they could, they were bound to do it, and did not. If they could not, the first rule of damages stated is the only one, and the referee's finding of law is unsustained by the facts, as there is neither finding nor testimony to fix the damages within this rule. Indeed, the plaintiff swore he did not remember what the petroleum cost, nor what it was worth, and refused to produce the books showing this. The exceptions to this finding are, therefore, well taken. So is the exception to the refusal to dismiss the complaint. So is the exception to the referee's refusal to admit evidence of the cost of the petroleum in New York.

II. If the plaintiffs were entitled to recover the difference between the freight paid and that agreed upon, they can only recover it in gold. The contract was, by its terms, payable in "gold," and damages for the breach of such a contract are recoverable in gold; and the judgment must be so expressed. This point was decided in *Butler v. Horwitz*, (7 Wall. 258,) and the judgment below was there reversed, because it added the premium on gold and gave judgment in currency. This point is raised by the exception to the referee's findings, and by the exception to the admission of the evidence on this branch of the case.

III. In any event, the defendants were entitled to have the amount saved in insurance, by reason of the improved mode of carriage, deducted from the recovery. This really and in effect reduced the freight actually paid.

IV. The defendants, in any event, were entitled to the benefit of their offer to carry the petroleum at \$2 per barrel. They were able to carry it out; their good faith in making it is not impugned. It was not even noticed by

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the plaintiffs, but they immediately effected a charter at \$4 per barrel. They did not ask the name of the vessel tendered by the defendants, or the day she was to sail, and cannot now reject the offer on the ground that these were not given. They would have been given had the objection been taken at the time. It is like the case of a tender of bank notes. If a man refuse the tender, he must specify his objection, or it is waived.

V. The judgment should be reversed. The plaintiffs refused, on the trial, to produce their books, and the account of sales rendered them by their agent in Spain, so as to enable the referee to fix the true rule of damages. If a new trial is granted, it should, therefore, be upon the payment of costs of the trial and the appeal, and the order of reference should be vacated.

Henry Whittaker, for the respondents.

I. The first four exceptions taken by the appellants to the referee's report are wholly nugatory and untenable. For they are taken wholly to his decisions on questions of fact on which there is evidence to support the results deduced by him. His decisions, therefore, on those questions are conclusive, and cannot be reviewed. For there is no ground on which it can be reasonably contended that these decisions are contrary to evidence, or even contrary to the weight of evidence. The whole weight of evidence is in their favor, and the most cursory examination of the testimony will show that if the referee had decided otherwise, his decision could not have been sustained.

II. And the facts thus found by the referee established conclusively the existence of the plaintiffs' cause of action. For they establish a positive contract to carry the petroleum in question at an agreed rate; a tender of that petroleum for carriage in due season; a willful breach of contract on the part of the appellants, and damages resulting from that breach, such damage being "the difference between the con-

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tract price and the price which the respondents were compelled to pay to others for the same services." The plaintiffs' cause of action is therefore perfect, and the decision of the referee the necessary result of its establishment. The burden of showing an excuse rested with the appellants, and that burden they have not sustained. The plea that they offered to transport the goods at the same price, and that the respondents refused their offer, is wholly unsustained by proof. (*Costigan v. Mohawk and Hudson R. R. Co.*, 2 *Denio*, 609; *approved*, 28 *N. Y.* 77.)

III. The only real question that the case presents is as to the quantum of damages, and on that point the referee's decision was correct. For it was the only decision he could have come to; all the evidence before him tending to one result, and to one result only; such result being the result to which he came. The burden of showing that a different rule of damages should be adopted rested upon the appellants. They claimed a reduction, and, making such claim, were bound to show facts on which that claim could be based. They were wrongdoers by reason of their willful breach of contract, and every presumption lies against them and in favor of the respondents—the parties injured by that breach. (*Costigan v. Mohawk and Hudson R. R. Co.*, 2 *Denio*, 609.)

IV. But the rule of damages applied by the referee was the correct, and the only correct rule. The respondents having proved their cause of action, are entitled to such damages as will give them a full and complete indemnity in respect of the breach of contract committed by the appellants. "They are entitled to be placed in the same situation, in a pecuniary point of view, as they would have been in if the appellants had honestly performed their engagement. (*Ogden v. Marshall*, 4 *Seld.* 340, and cases cited. *Nourse v. Snow*, 22 *Greenl.* 208, [210.] *Cooper v. Young*, 22 *Geo.* 269, [272, &c.] *O'Connor v. Foster*, 10 *Watts*,

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418, [421, 422.] *The Flash*, 1 Abb. Adm. Rep. 119. *The Zenobia*, Id. 80. *Sedg. on Dam.* 402, 405, n., 4th ed.) And the rule of damages adopted by the referee has been applied by the Court of Appeals and the admiralty courts under circumstances analogous to the present. (*Ogden v. Marshall*, 4 Seld. 340. *The Flash*, 1 Abb. Adm. Rep. 119. *The Zenobia*, Id. 80.) And it is now settled that a liability arising under a contract, payable in gold, must be satisfied in gold or its equivalent, and *a fortiori* that is the rule where, as here, such payment in gold is to be made in a foreign country. (*Bronson v. Rodes*, 36 How. Pr. 365. S. C. 5 Abb. N. S. 247. *Luling v. Atlantic M. Ins. Co.*, 50 Barb. 520.) And the mode of liquidating those damages at the place where the freight contracts both called for such payment, and then drawing on the appellants for the difference between the contract price and the price actually paid, reducing that price into currency of the country on which that draft was drawn, and where it had to be paid, was the direct, business-like and proper, and in fact the only business-like and proper mode of effecting that liquidation. And on comparison of the price of gold at New York, as stated by the respondents in their letter of instruction to Rudolph, under which the settlement was made, *i. e.*, above 148 premium, and the estimated difference between gold at Cadiz and currency in New York, at which the draft was actually sold by Nocetti, *i. e.*, 40 per cent only, it will be seen that that estimate was a very favorable one for the defendants, and probably reduced the amount actually payable by them. But it rested with them to show the contrary, (*Costigan v. Mohawk and Hudson Railroad Company*, *above cited*;) and that they have not attempted to show. The rule of damages applied by the referee was therefore the correct, and the only correct rule, and was properly applied.

V. The remaining exceptions are equally unsustainable, because the referee's award of judgment in favor of the

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plaintiffs is the necessary result of the facts found by him, and of the proper application of the established rule of law to those facts as found.

By the Court, CARDOZO, J. The defendant seeks to apply to this case the rule of damages which would obtain if the plaintiff could not have procured the goods to be sent at all; as, for instance, by reason of there being no other vessel, or an embargo being laid, or a canal freezing. (*Bracket v. McNair*, 14 *John.* 170. *O'Connor v. Foster*, 10 *Watts*, 418.) But that rule does not prevail when the party can send by another conveyance. Then he must do so, and he will be entitled to recover, as was allowed here, the difference between the price at which the defendants undertook to carry the property, and the price which the plaintiffs were compelled to pay for its transportation. (*Ogden v. Marshall*, 4 *Seld.* 340.)

The letter of the defendants, of November 20, 1865, can scarcely be deemed an offer. Neither vessel, rate nor time was mentioned. And from the testimony as to the interviews between the parties, it is plain that the defendants did not intend to make any definite proposition on the subject. I think, therefore, that the referee's finding, that the vessel by which the plaintiffs sent was the only one offering or willing to take the petroleum after the sailing of the *Contest*, cannot be disturbed.

We think the rule as to the form of the judgment laid down in 7 *Wallace*, 258, not binding on the State courts, and that it is not the correct one, but simply leads to great inconvenience, without any practical advantage.

The judgment should be affirmed.

[FIRST DEPARTMENT, GENERAL TERM, at New York, November 1, 1870. *Ingraham*, P. J., and *Cardozo*, Justice.]

HULETT *vs.* WHIPPLE and others.

A judgment creditor, who advances his money upon the faith of an unincumbered title upon the record, without notice, is entitled to the lien acquired thereby, in preference to the secret, unrecorded lien of the vendor, for a part of the purchase money.

Such a judgment creditor is to be regarded as a *quasi* purchaser for a valuable consideration, without notice.

The plaintiff, being the owner in fee of land, conveyed the same to C. by warranty deed, taking the promissory notes of the latter for a portion of the purchase money, payable at different times. At the time of taking such conveyance and executing the notes, C. promised the plaintiff, orally, that he would give him security therefor by bond and mortgage, or would give him security on the land. But no further or other security than the said notes was ever given. Subsequently, the defendants, without notice of any lien of the plaintiff for the purchase money, advanced their money to C. upon the faith and credit of the land and the apparent unincumbered record title thereto in him. The deed to C. was drawn by the plaintiff himself, who did not prepare any mortgage to be given, nor require or demand a mortgage as security. The plaintiff waited two years and nine months without making this equitable claim known to others, or making any demand for its enforcement; he received the amount due upon one of the notes, at maturity; and did not then demand a mortgage, nor did he ever make a demand for it, until he brought this action. *Held* that the conduct of the plaintiff amounted to a legal *waiver* of his right to an equitable lien upon the premises, for the purchase money, as against the lien of the defendants under their judgment.

THIS action was prosecuted by the plaintiff to foreclose an equitable mortgage for part of the purchase money claimed by him upon certain real estate situated in Clinton county, conveyed by him to one William Cressey, in 1865.

The defendants Whipple, Rousseau and Braman, alone defended. They defended under two judgments afterwards recovered by them against said Cressey, particularly under one recovered November 13, 1866, for \$20,071.49, for actual advances at that time made by them to said Cressey, and then agreed to be made, and afterwards in fact made as upon the faith of said judgment and its lien

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upon said real estate, without any notice or knowledge of the said claim of the plaintiff.

The action was tried before one of the justices of the fourth district, without a jury, and who found as facts therein, as follows :

1st. That on the 8th day of March, 1865, the plaintiff was the owner in fee of the lands and premises described in the complaint; and that on that day he conveyed the same (by warranty deed recorded March 20, 1865,) to the defendant William Cressey, as in the complaint stated; and thereupon and in consideration of such conveyance, said Cressey executed to the plaintiff three promissory notes for the sum, and sums, and payable as is also in the complaint averred; and further, that there remains due and unpaid on said notes, the amount in said notes specified.

2d. That at the time of said conveyance and the making and delivery of said notes, Cressey promised the plaintiff, orally, that he would give him security therefor, by bond and mortgage, at any time thereafter; or would, at any time thereafter, give him security on the land. But no further or other security than said notes was ever given by him; and the said notes, except the one which first fell due, and which was paid to the plaintiff, remained and still remains in the plaintiff's hands, and were produced by him at the trial.

3d. That said Cressey became and is insolvent, and was declared bankrupt, as in the complaint stated; and judgments were obtained and docketed against him, as is also averred in the complaint.

4th. That the two judgments in favor of the defendants, Whipple, Rousseau and Braman, against the defendant Cressey, the one for \$25,095.68, the other for \$20,071.49, docketed in Clinton county, the former on the 12th of December, 1865, the latter November 13, 1866, were duly entered upon confession according to law, and became

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and were valid and binding judgments against said Cressey, and liens upon his property; and were given and confessed for the purposes and on the considerations stated in the answer of the defendants, Whipple, Rousseau and Braman, to the complaint herein; and said last named defendants thereupon made advances to said Cressey, as is averred in the said answer, on the faith of said judgments and of the lien and liens thereby created, in good faith, and without knowledge or notice that the purchase price of said land and premises had not been fully paid and satisfied to the plaintiff.

5th. That execution was issued upon each of said judgments, as stated in the said defendants' answer herein; and said lands and premises mentioned and described in the complaint (with other property of said Cressey) were sold thereunder, as is also therein averred, and the said defendants, Whipple, Rousseau and Braman, became the purchasers, and ultimately took the sheriff's deed therefor.

And as matter of law, the judge decided and adjudged, upon the pleadings herein and the facts above found and stated, that the defendants, Whipple, Rousseau and Braman, having made full advances to Cressey, on the credit of the lands and premises described in the complaint, and on the faith of their judgment liens, *bona fide*, without notice of the plaintiff's equity, were entitled to be protected in their legal title, formally and duly obtained by them, against the plaintiff's equitable claim for the balance of the purchase money remaining unpaid. That the said defendants' legal title should prevail over the plaintiff's equity. That the complaint should therefore be dismissed, with costs to the defendants, Whipple, Rousseau and Braman, against the plaintiff, and judgment was ordered and awarded accordingly.

From the judgment entered upon these findings the plaintiff appealed.

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J. Gay, for the plaintiff.

Beach & Smith, for the defendants.

By the Court, POTTER, J. The case presents an exceedingly nice question in the law of equity, which, in some of its features, I think, has not been previously settled, in this State, by any adjudged case. Various cases having features in some respects similar, are found in the books of authority; and there are certain general principles of conceded authority that apply to all cases coming within certain rules, which require no labor to give them application. As for instance, it is a general doctrine of the law of equity, that the vendor of real estate holds an equitable lien, as against the *vendee*, for the unpaid purchase money; and this lien extends to the heirs and privies in estate of the vendee, and against subsequent purchasers with notice of the lien, and even against purchasers who advance no new consideration. It also extends against voluntary assignees, who are not regarded as being, within the meaning of the law of equity, *bona fide* purchasers; and as a general rule, it extends against *general* judgment creditors of the vendee; but, as was said in the Court of Appeals, in the case of *Fisk v. Potter*, (2 *Keyes*, 68,) its existence "is an anomaly in the law," (and it is so, especially in a State where the recording acts are declared to have force, and where parties may be presumed to act in reference to them.) "It is controlled by no well settled rules; but, on the contrary, the existence of the lien is generally made to depend upon the peculiar state of facts and circumstances surrounding the particular case." It is well settled that the lien does not exist against purchasers of the legal estate from the vendee without notice of the vendor's lien, for a valuable consideration, if they have advanced their money. (*Bayley v. Greenleaf*, 7 *Wheat.* 46. *Garson v. Green*, 1 *John. Ch.* 308, 309.) Nor can it be asserted against creditors of

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the vendee, who hold under a *bona fide* conveyance from him. In *Bayley v. Greenleaf*, (*supra*, p. 51,) Chief Justice Marshall, in speaking of such a lien, said: "It is a secret, invisible trust, known only to the vendor and vendee, and to those to whom it may be communicated in fact. To the world, the vendee appears to hold the estate divested of any trust whatever, and credit is given to him, in the confidence that the property is his own, in equity, as well as law. *A vendor relying upon this lien, ought to reduce it to a mortgage, so as to give notice of it to the world.* If he does not, he is in some degree accessory to the fraud committed on the public by an act which exhibits the vendee as the complete owner of an estate on which he claims a secret lien. It would seem inconsistent with the principles of equity, and with the general spirit of our laws, that such a lien should be set up in a court of chancery, to the exclusion of *bona fide* creditors. The court would require cases in which this principle is *expressly decided*, before its correctness can be admitted."

In the light of this doctrine, let us examine the case before us. The learned judge finds that the facts set up in the answer of the defendants, other than Cressey, are true, which is, in effect, that the defendant Cressey applied to them for the advance of money to him, to assist him in business, and to be secured upon his real estate; that upon the records of the clerk's office they found, upon search, that his real estate was free from incumbrance. Upon the faith of this as security, and without any knowledge of this secret claim of his grantor, they, in good faith, advanced the amount specified in the judgments which were given in evidence; and which are due and unpaid. This presents, fairly, the question of equities between these parties.

Cases can be found, where it has been held that judgments given for an antecedent debt, must give way to the equitable lien upon *specific* property, upon the ground that

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a judgment is a lien upon *all* real estate, and shall not be preferred to the specific lien upon one portion of it. So, too, English cases are found, in which the mortgagee, in an equitable unrecorded mortgage, is preferred to general judgment creditors. *The Earl of Winchelsea's case*, reported in 1 *P. Wms.* 277, was where the earl entered into a contract for the sale of his estate, and received payment of a valuable consideration therefor by the vendee, but before conveyance, and while he was yet in possession, he confessed judgment to creditors. It was held that from the time the earl entered into this agreement, having received the consideration, he was but a trustee for the purchaser, and that the estate in equity belonged to the vendee, as against judgment creditors; but from the statement of the case, it is clearly to be implied that the judgments were for antecedent debts; for it was urged that the debts upon which the judgments were confessed were for debts upon which he had been trusted, and upon the ground that that he had been the apparent owner, and in possession of a large estate. But even this decision was made, as we are informed by *Fonblanque*, when the common law lawyers were pouring out their complaints against the encroachments of the court of chancery, in its attempts to control the judgments of inferior courts; and he adds, in a note, a quære, whether the judgment creditor in *Burgh v. Burgh*, and in *The Earl of Winchelsea's case*, had not also notice of the former equitable incumbrance. (1 *Fonb.* 35 to 37, notes *r.* and *u.*) And he says those are the only two cases to be found in the books, where a court has interfered in prejudice of a defendant having a legal interest without notice. The case, *Matter of Howe*, (1 *Paige*, 125,) is based upon these two English cases. This is the principal case relied upon by the plaintiff in the case at bar. The chancellor admits that he could find no case in this State, where this question had then been examined, (p. 128.) The chancellor also cited as authority to

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sustain his opinion, *Sugden on Vendors*; but Chief Justice Marshall, in *Bayley v. Greenleaf*, questions the authority of *Sugden*, to the extent that it is given by the chancellor; and in the case cited from 2 *Serg. & Rawle*, the main question was, whether the purchaser by articles had a right to apply the purchase money agreed to be paid, to *existing* judgments against his vendor, and it was held that he had; but Chief Justice Tilghman, who delivered the opinion of the court, said: "I desire it may be distinctly understood, that no opinion is intimated concerning the general effect of a judgment against the vendor *subsequent* to the articles of agreement for the sale of lands. It is a point of very great importance, upon which much property depends. The case must be decided upon its own circumstances." In the case of *Hurst v. Hurst*, cited also by the chancellor, from a note in 3 *Binney*, 347, Washington, J., cites a case from *Prec. in Chan.* 478, which lays down the principle, that a creditor advancing money upon the credit of a judgment, stands in a different situation from a *general* judgment creditor; since, he may, in equity, be considered as a *quasi purchaser or mortgagee*. All these English cases are uniform in holding that a *bona fide* purchaser, or mortgagee, holds a higher claim, in equity, than a mere secret equitable lien; and Chancellor Walworth adopts the principle, and says it is sound, that *bona fide* purchasers of the legal estate, and *mortgagees who have advanced their money on the credit of the land*, are to be considered as *bona fide* purchasers.

Now the points in the case before us are precisely these. The defendants, without knowledge of this secret, unrecorded lien, (if it be one,) advanced their money on the credit of the title and land of Cressey; the advances were made subsequent to the time when Cressey had the apparent unincumbered record title; and made upon the faith and credit of that title. Such is their claim. The plaintiff claims to hold a secret, equitable lien for a part of the

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purchase money of the land conveyed to Cressey. He himself prepared the deed of conveyance, or caused it to be prepared, in advance of its execution; he did not prepare a mortgage to be given; nor, at the time of the delivery of the deed, the receipt of \$1000, and the taking of notes for the balance, did he require or demand a mortgage as security. The deed, as the plaintiff says, was executed at his own house, between 10 and 12 o'clock at night; he consented then to take Cressey's notes, and let him go; he waited two years and nine months, with this equitable claim, without making it known to others, or making a demand for its enforcement; he received pay on one of the notes given for payment, when it became due, and did not *then* demand a mortgage; nor did he ever make a demand for it, until he brought this action.

This state of facts presents two questions of law: 1. Which has the higher equity, the creditor by judgment, who advances money upon the credit of an unincumbered record title, subsequent to the conveyance, and without notice of a secret trust, or equity; or, the grantor of the title, who permits his vendee to pass himself off to the world as the complete and absolute owner of the land, and by reason thereof, allows him to obtain confidence and credit from others, upon the faith that he was the absolute owner?

I can find no case, in this State, which has passed upon this as a distinct question. The case which lays down the rule which is the nearest approach to it, is the *Matter of Howe*, (*supra*;) but that does not at all decide this question; that was not a case, in its features, like this. The cases of *White v. Carpenter*, (2 *Paige*, 217,) and *Arnold v. Patrick*, (6 *id.* 315,) are relied upon also. Those cases only go to the extent that, as a general rule, the claim of a *general* judgment creditor is controlled by an equitable claim upon a specific portion of the lands of the debtor; and in none of those cases does it appear whether the

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judgment debt was not for an old or antecedent debt. The only case I have found, which in all respects is like this case, is that cited by Washington, J., in *Hurst v. Hurst*, (3 *Binney*, 347,) from *Prec. in Chan.* 478, in which the distinction was made between a judgment creditor advancing his money, without notice, on the faith of a good title, and a *general* judgment creditor who did not so advance; the judgment of the former giving him the character of a purchaser in good faith in equity. Without access to this authority, otherwise, the principle strikes me as a sound doctrine of equity, and a well taken distinction. It comes within another well acknowledged principle of equity, that where one of two equally innocent parties must suffer, he by whose act, or negligence, the injury has been caused, must bear the loss. Here is great negligence, at least on the part of the plaintiff; there is diligence and good faith on the part of the defendants.

I think, upon the whole authorities cited, it may be laid down as a sound rule of equity, that a judgment creditor who advances his money upon the faith of unincumbered title upon the record, without notice, is entitled to the lien acquired thereby, in preference to the secret, unrecorded lien of the vendor for a part of the purchase money; that such judgment creditor is to be regarded as a *quasi* purchaser for a valuable consideration, without notice. The court below gave no opinion to inform us of the grounds upon which he based his judgment. Upon the ground we have pointed out, I think the judgment should be sustained.

2. Upon the whole circumstances of this case, I think the judgment can be sustained, on the ground of a legal *waiver* by the plaintiff to his right to his equitable lien, *as against bona fide judgment creditors who have advanced their money upon the faith of an unincumbered record title, subsequent to the title of the plaintiff.* The law upon this subject is very fully discussed, and had the approbation

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of the Court of Appeals, as it appears reported in the case of *Fisk v. Potter*, (2 *Keyes*, 74, *§c.*) It will be only necessary to refer to that case, to establish the principle of *waiver* by the conduct of the party. That case seems to establish the law, that such equitable liens are controlled by no settled rules, (p. 68,) but are made to depend upon the peculiar state of facts and circumstances surrounding the particular case.

Looking at this case in view of its own circumstances, I think the conduct of the plaintiff amounted to a legal waiver of his claim *as against the defendant's lien*. If this was the ground upon which the learned judge decided the present case, I think the judgment can also be sustained on this ground. The result is, the judgment should be affirmed.

[THIRD DEPARTMENT, GENERAL TERM, at Ogdensburgh, November 1, 1870. *Müller*, P. J., and *Potter* and *Parker*, Justices.]

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D. and L. CHURCHILL *vs.* STONE, administratrix, &c.

Money was paid by the plaintiffs' assignors to S., in order that such assignors might become members of an association of which S. was president; but there was no evidence, or finding, that they ever did become such members. Subsequently the association was dissolved. *Held* that the money having been paid for an object that was never accomplished, and which it had become impossible to accomplish, S., or his administrator, was bound to refund the same.

Where exceptions are taken, upon the trial, or after its close, to findings and refusals to find, by the referee, but upon the brief and argument on appeal, no point is taken upon such rulings, the court may assume that they are waived, or not relied upon by the appellant.

THE defendant appeals from a judgment in favor of the plaintiff, entered upon the report of a referee.

The action is for the recovery of money. The first count claims \$300, "paid and advanced" April 9, 1866, by

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the plaintiffs, to S. S. Stone, the defendant's intestate. The second count claims \$300 "lent and advanced" at the same time by the Troy National Paper Company to Stone. The third count is for \$300, "had and received" by Stone, from Henry J. White. And the fourth count is upon an alleged indebtedness of Stone to Josiah Rowe, for money "had and received." The plaintiffs claim as assignees of the last three demands.

W. A. Beach, for the appellant.

J. H. Reynolds, for the respondent.

By the Court, POTTER, J. The advance of money by the assignors of the plaintiffs to the defendant's intestate was sufficiently proved to sustain the finding of the referee. The defense was, that these advances were made to the defendant's intestate as president of an association, called "The United States Paper Collar Manufacturing Association," and that it was a simple partnership, for a single enterprise; that it partook of all the characteristics of a business firm, having no organization under legislative authority; and that an action at law cannot be maintained against a copartner, in regard to partnership matters, without a balance struck, and a promise to pay. The answer of the defendant admits, and the evidence confirms it, that each of the assignors of the plaintiffs paid the defendant's intestate, as president of such association, the sum of \$300. The answer further alleges, that the money was actually expended in and about the business of such association or copartnership. If this answer was true, it would seem to leave but two questions or issues to be determined by the referee; to wit: 1st. The question of fact, whether the money, or part of it, had been actually expended in the business of the association; and, 2d. The question of law, whether an action could be maintained by one co-

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partner, against his associate, before an accounting and balance struck.

The referee does find as a fact, that such an association or copartnership as "The United States Paper Collar Association," was formed, and there was evidence that the said several sums so assigned were paid that each party might become a member of a certain association, but there is no finding that the plaintiffs' assignors ever became members of such association. The referee did find as a question of fact, that "The United States Paper Collar Association" was dissolved on the 15th of March, 1866. Unless these findings of fact are erroneous, it follows that these sums of money were paid for an object that was never accomplished, and that after it became impossible to carry out the object, the defendant's intestate failed to return to the plaintiffs' assignors the sums they so paid him. Therefore, even if the defense set up was a good legal defense, it fails of being sustained by evidence, and the judgment must be affirmed, unless the referee committed some error on the trial for which it can be reversed.

The case shows that several exceptions were taken upon the trial, or after its close, to the findings and refusals to find by the referee; but upon the brief and argument, no point is taken upon such rulings, and the court, in such case, may assume that they are waived or not relied upon by the party appealing. The facts found seem to have evidence to sustain them, and there was some conflict, as to which this court cannot discuss the weight of the evidence. I think the judgment must be affirmed.

Judgment affirmed.

[THIRD DEPARTMENT, GENERAL TERM, at Ogdensburgh, November 1, 1870.
Müller, P. J., and Potter and Parker, Justices.]

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Where the minds of the parties to a contract do not meet upon the whole and exact terms of such contract, the same is void.

Whatever is done between the parties, under a supposed agreement, where there is a mutual misunderstanding as to its terms, is not binding; and though both parties consent, at the time, to the delivery of a portion of the property agreed to be sold, each supposing that such delivery and acceptance is to be a part performance of the contract, and that the purchaser will only become the absolute owner when the whole contract shall have been performed, the law will not imply that either of the parties intended that the property delivered was to be absolutely the purchaser's in case he failed to comply with the whole agreement.

Where one is in possession of property with no other claim of title thereto than a partial or conditional one, as purchaser under a void contract of sale, which each party refuses to perform, except according to his own understanding of its terms, the title of the property is not changed, and the vendor is entitled to recover such property, upon legal demand made.

After demand of such property is made, the purchaser is wrongfully in possession; and his use of the property, afterwards, is a conversion thereof to his own use.

If the complaint in an action to recover the possession of personal property, states facts sufficient to show that in law the defendant's holding of the property is unlawful, that is sufficient; especially after judgment.

The omission to allege, in the complaint, a demand of the property before suit brought, is cured by proof of the fact, by the report of the referee, finding the fact of a demand, and by the judgment.

When the parties go down to trial, and a cause of action is proved, though the complaint may be defective, tested merely as a pleading, upon demurrer, it is the duty of the referee, or a court, to conform the pleading to the facts proved, in furtherance of justice; and, after judgment, if it be entered according to a case duly proved, it is the duty of the court to amend, or to regard the pleading as duly amended.

THIS is an appeal from a judgment entered upon the report of a sole referee. The action is in the nature of trover, for the value of a horse. The report of the referee was in favor of the plaintiff, and the facts and conclusions of law were as follows:

1. That on or about the 15th day of September, 1869, the plaintiff and defendant entered into certain negotiations for the sale by the plaintiff to the defendant, of cer-

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tain real estate and personal property of the plaintiff, of which personal property, the horse mentioned in the complaint was a part, and both plaintiff and defendant then and there supposed they had mutually and fully agreed upon all the terms and conditions of a contract of sale of the said real and personal property, but in fact both misunderstood, and understood differently, such terms and conditions, and the same was never reduced to writing or subscribed by either party thereto.

2d. That the plaintiff understood that by the terms and conditions of said supposed contract, he was to sell and convey to the defendant the said real estate for the sum of \$5700, and the said personal property for an additional sum equal to the fair value thereof, which was not named; but the defendant understood thereby that the plaintiff was to sell and convey to him both the said real and personal property for the sum of \$6000, without any separate price or consideration being named for the said personal property.

3d. That by the undisputed terms of the said supposed contract the said real estate and personal property were to be conveyed to the defendant on the 1st day of April, 1870, when the consideration therefor was to be paid by the defendant.

4th. That both the plaintiff and defendant then, and up to January 6, 1870, were ready and willing to perform and fulfill the said supposed contract, each according to his respective understanding of its terms and conditions, and the defendant on the 1st day of April, 1870, expressly offered so to do on his part, which offer the plaintiff refused to accept.

5th. That in pursuance of said supposed contract, and the respective understandings of the parties in relation thereto, the plaintiff, on or about the 20th day of September, 1869, delivered to the defendant the horse mentioned in the complaint, and the defendant then and there ac-

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cepted the same, each supposing such delivery and acceptance to be a part performance of the said supposed contract, and that the defendant would thereafter be the owner of the same if he fully performed the terms and conditions of the said supposed contract, and the said horse, ever since, has been in the possession of the defendant.

6th. That thereafter, and on or about December 22, 1869, the plaintiff and defendant discovered their misunderstanding of the terms and conditions of the said supposed contract, and each refused to perform the same according to the other's understanding thereof; and on or about the 6th day of January, 1870, the plaintiff demanded from the defendant the horse mentioned in the complaint, which the defendant refused to deliver to him.

7th. That the value of said horse was \$175.

From which facts the referee found the following conclusions of law :

1st. That the said negotiations or supposed contract did not, in fact, amount to any contract between the parties.

2d. That on the 6th day of January, 1870, the plaintiff was entitled to the possession of the horse mentioned in the complaint, and that on that day the defendant unlawfully converted the same to his own use.

3d. That the plaintiff is entitled to recover from the defendant in this action, the sum of \$175, together with the interest thereon from January 6, 1870, amounting to \$181.16, besides costs of this action ; for which sum judgment was directed to be entered.

The defendant excepted to these findings of fact and conclusions of law, and appealed from the judgment to this court.

G. H. Lee, for the plaintiff.

I. C. Ormsby, for the defendant.

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By the Court, POTTER, J. On a careful examination of the evidence, I think the referee was justified in his findings of fact. The defendant's possession of the horse in question was under and by virtue of a contract for the purchase of both real and personal property, resting in parol only. This contract was never performed, nor partly performed, except to the extent of the defendant's taking possession of the horse in question, which was a part of, and included in, the parol contract. This contract being for the sale of real estate, and also for the sale of personal property of the value of above \$50, without any writing, or written memorandum, subscribed by the vendor, or vendee, was void at law. But the contract (if such it should be called) was void for another reason; or rather, was void because it was no contract; the minds of the parties never met upon the whole and exact terms of the contract itself. This not only appears from the referee's report, but from the evidence. It is hardly necessary to cite authority to this proposition. And it follows that whatever is done between the parties under a supposed agreement, when there is mutual misunderstanding, is not binding; and though both parties consented, at the time, to the delivery of the horse in question from the plaintiff to the defendant, each supposing that such delivery and acceptance was to be a part performance of the supposed contract, and that the defendant would only become the absolute owner when the whole contract should be performed, yet the referee does not find, nor will the law imply, that either of the parties intended that the horse was to be absolutely the defendant's in case he did not comply with the whole agreement. There was no oral agreement, even for a forfeiture of the horse; or of anything else. And the defendant showed no other claim or title to the horse than that of a partial and conditional one, under a void contract. Being in such possession, with only such title, each party refusing to perform,

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except according to his own understanding of the terms of a void contract, the title of the horse had never changed, and the plaintiff was entitled to his property upon legal demand; and after such demand the defendant was wrongfully in possession, and his use of the horse afterwards was a conversion of the plaintiff's property, to his own use. Though the plaintiff in his testimony did characterize the letting the defendant have the horse as a lending to him, the facts show, as does the referee's report, that the act was not a legal *lending*, and the plaintiff was mistaken in the use of terms. Nor do I think the defendant's criticism upon the complaint to be good, under the system of pleading introduced by the Code. If the complaint states facts sufficient to show that in law the defendant's holding the property was unlawful, that is sufficient; especially after judgment. And when the parties go down to trial, and a cause of action is proved, though the complaint might be defective, tested merely as a pleading, upon demurrer, it would be the duty of the referee, or a court, to conform the pleading to the facts proved, in furtherance of justice; and after judgment, if it be entered according to a case duly proved, it would be the duty of the court to amend, or regard the pleading as duly amended. If we are right in this view, the omission in the complaint, if it be one, to allege a demand of the property before suit brought, is cured by the proof, by the report of the referee and the judgment.

Upon the whole view of the case, I think the judgment is in accordance with the justice of the case, and with plain rules of law, and should be affirmed.

Judgment affirmed.

[THIRD DEPARTMENT, GENERAL TERM, at Binghamton, December 6, 1870.
Miller, P. J., and Potter and Parker, Justices.]

SETH H. TERRY *et al.* administrators &c. *vs.* JOHN McNIEL.

Where the evidence, on a trial before a referee, was greatly conflicting, and its weight depended almost entirely upon extrinsic circumstances, and the degree of credit to which witnesses were entitled, of which the referee, who saw their deportment on the stand, and who lived in the vicinage, was better qualified to judge than any reviewing court could be, who saw the witnesses only upon paper; *Held* that upon well established authority the case could not be reviewed, on appeal, upon the facts.

An order of reference, made at a special term, is not brought up by an appeal to the general term from the *judgment* entered in the action. Such order, if erroneous, should be corrected by a direct appeal from it to the general term. The examination of witnesses upon commission being under the authority of a statute, must be in strict obedience to the statute rule. It is a departure from the common law practice, and is susceptible of great abuse, unless a rigid rule is observed, in practice. *Per* POTTER, J.

The testimony of a witness taken upon a commission will be stricken out on the trial if it is evasive, irresponsive or untruthful, or the witness has not fully and fairly answered the cross-interrogatories.

Where the object of questions put to a witness, on cross-examination, is to test his memory, the allowance thereof is a matter within the discretion of the referee.

Where the defendant had previously been called as a witness in his own behalf, and had testified to an examination of certain account books of the plaintiff's intestate and the entries therein, and had impeached such entries as to an omission of credits to himself; *Held* that it was competent to impair this testimony in all possible legal ways, and to impeach the memory of the witness as to such books, and the entries therein, by their production; and to do this by the testimony of the plaintiff, with whom the defendant had examined them.

Held, also, that the books, so far as they gave credits to the defendant, were admissible, because the entries were against the interest of the plaintiff; that they were therefore competent evidence.

Prices current, published for public information, and for general purposes, in a public newspaper, are admissible in evidence for the purpose of showing what was the price of grain, in the market, at the time of publication.

In an action by the administrators of the assignee of a bond and mortgage, against the mortgagor, to recover the balance due thereon, a mortgage book, owned by such assignee, containing entries of payments, and of interest accrued, upon the bond and mortgage in question—after proof that such book, and the entries therein, had been shown to and examined by, the defendant, who made no objection thereto, claiming only that there was one receipt not credited therein—is admissible in evidence, not technically as a book, but as containing a statement of debt and credit between the parties, admitted to be correct, to a certain extent, by the defendant.

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THIS action was brought by the plaintiffs as administrators of William Stevenson, deceased, against the defendant, upon book account, upon several promissory notes, and for balance due on a bond secured by a mortgage. The action was tried by a sole referee, who reported in favor of the plaintiffs \$1158.20 as due upon the bond and mortgage, and found nothing due upon the account or the notes, but that they had all been paid and satisfied. The appeal is brought to reverse the finding of the referee. The case had been in the courts, and previously tried at one or more circuits, and appeals to the general term; judgments reversed; orders of reference, &c.; and there had been various other orders, proceedings, and stipulations in the case, reference to which, with other facts, sufficiently appear in the opinion.

J. S. Coon, for the appellant.

J. Gibson, for the respondents.

By the Court, POTTER, J. The only review that can be taken of the trial, in this case, must be as to errors committed by the referee on the trial. No error of fact is claimed, upon either side, as to the report upon the account or notes sued upon; and there can be no real complaint upon the merits, upon any fact regarding payments upon the bond, except as to one payment of the amount of \$315, on the 15th day of February, 1841. After a thorough review of the evidence in regard to this item, I do not feel justified in reversing, and I think a court of review could not, by any known rule, reverse the judgment upon this finding, for the reason that the evidence is greatly conflicting, and its weight depends almost entirely upon extrinsic circumstances, and the degree of credit to which the witnesses who testified are entitled, of which a referee, who saw their deportment, on the stand, and who lived in the

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vicinage, is more likely to judge correctly than any reviewing court who see the witnesses only upon paper. Upon well established authority, then, the case cannot be reviewed upon the facts.

The first point of objection by the defendant is to the order of reference made by the special term, on the ground claimed, that the action had been adjudged by the general term to be not a referable action; and that an appeal from a judgment brings up every proceeding in the progress of the action, and therefore that order was here for review. This point is not well taken. This order, if erroneous, should have been corrected by a direct appeal from it, to the general term.

The second objection to the ruling of the referee on the trial was, that the plaintiff moved before the referee to strike out the testimony of a witness, who had been examined upon a commission, to a portion of the direct interrogatories, on the ground that he had not fully and fairly answered the eighteenth cross-interrogatory thereto, and the referee granted the motion. The witness, John S. Steward, had been examined by the defendant on interrogatories in relation to other issues between the parties than that of the balance due on the bond and mortgage, and was regarded as an unfriendly witness to the plaintiffs; and in answer to the fourteenth cross-interrogatory, had answered, that he was unfriendly to the administrator, (Terry, the plaintiff;) and in the twelfth, that he had sued the estate, claiming several thousand dollars against them, and had been beaten, after a severely contested law suit, in which the estate had recovered against him nearly \$2000. The eighteenth cross-interrogatory of the plaintiff to this witness was in the following words: "Has the defendant, or any one for him, or in his behalf or otherwise, drawn, prepared, suggested or advised you by language, letter or otherwise, what interrogatory, direct or cross, would, could or might, be put to you on the execu-

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tion of this or any commission in this action, or in, or on taking your evidence therein, or in or on giving or aiding your answer thereto, or any or either of them, or any part thereof; or given or suggested to you any information, or other matter or thing, in regard thereto, or the nature thereof, or what question or questions would be put? A. I have advised the defendant's counsel what I would testify to; but no interrogatory or question were drawn or prepared that I know of, until this commission was issued; I had expected, up to about the time the commission was issued, to give my testimony in open court; I can give no further answer to this question than has already been given." Whether intended or not, it cannot but be seen that a portion of this answer is irresponsible; nearly the whole evasive; and the conclusion must be untruthful, when he replies that he can give no other answer than had already been given. He could surely answer, yes, or no, to portions of this cross-interrogatory. This method of examining witnesses being a statute authority, must be in strict obedience to the statute rule; it is also a departure from the common law practice, and is susceptible of great abuse, unless a rigid rule is observed in practice; a willing, or a stubborn witness, protected from the personal scrutiny of a court and jury, can cause great injustice by the exercise of his prejudices or his will; and it is the duty of courts to watch such proceedings with jealous care. The party who obtains such testimony takes it at his peril, if it carries upon its face a suspicion of injustice; and the party obtaining it is, upon its return, supposed to know its defects, and can apply to the court to have them corrected. If he carries his defective commission into court, he subjects it to judicial scrutiny. I think, in this case, it was rightly rejected by the referee. (*Smith v. Griffith*, 3 Hill, 339. *Lansing v. Coley*, 13 Abb. 272. *Valton v. National Fund Life Assurance Co.*, 20 N. Y. 32.) This is distinguished from the cases in practice where the execution of the commission

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is defective, when a party should move to suppress the commission. (2 *Abb.* 271. 4 *id.* 413. 19 *Barb.* 391.) There is still another reason why this ruling is not error in this case. The whole deposition has no bearing upon the only questions of fact litigated—that of the amount due upon the mortgage.

The next objection raised by the defendant, is to questions allowed by the referee to be put to the witness James Hall, a person in interest in the action, as to what he claimed, and allowed his counsel to claim, on a previous trial in this action, as to certain payments made upon the claims in the case. This objection is not well taken. The case shows that this objection was raised on the defendant's own cross-examination of the witness, though the case also shows that the defendant objected to the questions. Without any explanation, there is confusion about it that the court cannot solve. The witness was sworn on the part of the plaintiff; then he was cross-examined; then re-examined by the plaintiff; then again the cross-examination was resumed by the defendant, during which these questions now objected to were put; then again re-examined by the plaintiff; then again re-cross-examined by the defendant. If there is a mistake in the case, and this should be the defendant's witness, (which we cannot know,) then these questions objected to would be put upon a cross-examination, which would be tolerated as a matter of discretion in the referee, as the questions put seem to be to test the memory of the witness. We cannot hold this to be error, be it either way. This applies also to the objection taken to the question at folio 263, of the same character.

The objection to the introduction of the account books of William Stevenson, deceased, I think, under the circumstances, was not error. The defendant had previously been called as a witness in his own behalf, and had testified to an examination of the contents of these books, and

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the entries therein relating not only to the accounts and dealings other than the bond, but had in his testimony impeached the entries therein as to an omission of credits to himself. It surely was competent to impair this testimony in all possible legal ways, and to impeach the memory of this witness as to these books and the entries therein, by their production; and to do this by the testimony of the plaintiff, with whom the defendant had examined them. The books, so far as they gave credits to the defendant, are admissible, because such entries are against the interest of the plaintiff; they are therefore competent evidence. The first branch of the objection raised is insufficient; it is *limited* and *special*, "that the evidence is incompetent;" the second branch of the objection is too general, "that the books of the deceased could not be proved in that way." We have shown that for one purpose the books were competent, and that the first objection fails. As to the handwriting of a deceased person, it is competent to prove it by any person who knows it. No objection was made to the competence of the witness to speak as to his knowledge of the handwriting, or as to the identity of the books. This objection is not, therefore, good. There were several objections of this kind in substance, but the answer to them is covered in the view we have taken.

In the controversy, on the trial, as to payments made to the testator by one James Hall, Hall had been sworn as a witness, and in accounting for the amount of money he had received and paid the testator, he testified to having sold his crop of rye in the winter of 1841, at nine shillings and sixpence per bushel. To impair this testimony, the plaintiff had attempted to show the price of rye at that time to be much lower, in the Troy and Albany markets and elsewhere; and for this purpose offered a file of papers, obtained from the Young Men's Association of Troy, for the years 1840 and 1841, and a Washington county

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paper, published at Salem, at about those dates; from which it appeared that the price of rye was about 55 to 57 cents per bushel. The evidence from the files of the Albany *Argus*, only, was objected to as irrelevant and immaterial, and witness not competent.

The case of *Lush v. Druse*, (4 *Wend.* 314,) was an action of covenant for rent, payable in wheat. On the trial, a witness was introduced to prove the value of wheat in Albany on the day of the rent becoming due, in four successive years. The witness knew nothing of the price of wheat, of his own knowledge, but testified to the prices in those years as derived by him from the books of large dealers in wheat at Albany. This proof was objected to as insufficient. Savage, Ch. J., held this proof, uncontradicted, to be sufficient. In the case of *Cliquot's Champagne*, (3 *Wallace*, 115,) it was held that printed prices current, obtained from the agent of the manufacturer of wine, or from dealers in the manufactured article generally, which have been prepared and used by the parties furnishing them, in the ordinary course of business, are so far evidence of the value of the articles mentioned in them as that they may be submitted to a jury, as throwing light on the matter, and as some guides to candid men, and for their consideration. These authorities, I think—and they are not the only ones—justify the referee in receiving the evidence of the prices current, published at the time for public information, and for general purposes, in a public newspaper.

There were some rulings, in the admission of evidence by the referee, which, standing alone, uninfluenced by the effect of other testimony given in the case, might be regarded as erroneous rulings; such, for instance, as the entries in the mortgage book of Daniel Stevenson, deceased, of payments, and of interest accrued upon the bond and mortgage in question. Daniel Stevenson was the original mortgagee of the mortgage in question, and he

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assigned it to the plaintiff's intestate. But before this testimony was offered, it had been proved that this book and the entries therein had been shown to the defendant, who had examined them, and had made no objection, claiming only that there was one receipt not so credited. The book was therefore admissible, not technically as a book, but as containing a statement of debt and credit between the parties, admitted to be correct to a certain extent by the defendant.

The referee also made several errors in favor of the appellant, but they are not before us. Upon the whole case, I think justice has been done, and that there were no such legal errors committed upon the trial, as to require a reversal of the judgment. It should be affirmed.

Judgment affirmed.

[SARATOGA GENERAL TERM, June 6, 1870. *Rosekrans, Potter, Booke* and *James*, Justices.]

BAKER vs. SPENCER.

Whenever, in the facts found by a referee, it is seen that there has been a conflict in the testimony of the witnesses, it is well established that the finding of the referee, who has seen the witnesses, observed their manner and dispositions in testifying, and had better opportunities than the court for learning their character for veracity, must be sustained.

If portions of the evidence, standing alone, tend to sustain the findings of the referee, that is sufficient. It is not the duty of the reviewing court to go further.

If, from the evidence on paper, it even appears that the weight of evidence is against the referee's finding, the appellate court will not interfere so far as to reverse; unless such weight is so striking and palpable as to excite surprise.

The defendant, representing to the plaintiff that he had the agency for the sale of a sewing machine, for a particular county, and the right to sell and transfer the same, sold and transferred such agency to the plaintiff, who, relying upon the truth of such representation, gave his note for the price,

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and subsequently paid the same. In an action by the plaintiff to recover back the money so paid, the referee found, upon conflicting evidence, that the defendant had not in fact any agency for said county, or right to sell and transfer the same, and that his representations were false. *Held* that this finding warranted the conclusion that the plaintiff was entitled to recover back the purchase money paid by him, with interest.

THIS action was brought to recover back money paid upon a promissory note, upon the ground that the note was obtained by fraudulent representations, and that it was given without consideration. The issues were referred to a sole referee, for trial, who found and reported the following facts:

First. That the defendant, about the month of December, 1867, stated and represented to the plaintiff that he had the agency for the sale of the Weed sewing machine for the county of Saratoga, and the right to sell and transfer such agency, and offered and proposed to sell and transfer the same to the plaintiff.

Second. That the plaintiff, relying on such statements and representations, and believing the same to be true, agreed with the defendant to purchase such agency of him, and give him in consideration therefor, his (plaintiff's) note for \$500, payable in installments; and thereupon did execute and deliver to the defendant such note, as stated and averred in the complaint.

Third. That an action was brought upon said note, before Esq. Wells, as is also stated in the complaint, but no judgment was entered in such action, and a new note for \$300 was given by the plaintiff to the defendant, in the place and in lieu of said \$500 note, which latter note was paid by the plaintiff, as is also stated in the complaint.

Fourth. That said new note for \$300 was made and delivered by the plaintiff to the defendant on the same representations, statements and assurances of the defendant as were made by him when the first note was given, as herein before stated; and the plaintiff, in giving such note,

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relied on such representations, statements and assurances, and paid the same, as aforesaid, without knowledge of their falsity.

Fifth. That the defendant had not in fact any agency for said machine, for the county of Saratoga, to sell and transfer, and his representations, statements and assurances in that regard were false and untrue, and said notes were, and each of them was, fraudulently obtained, and were without consideration, and were void.

And as matter of law, the referee found and decided,

1st. That the plaintiff was not estopped from recovering herein by the giving of the new note for \$300, above mentioned.

2d. That the plaintiff was entitled to recover back from the defendant the money paid by him on said \$300 note, with interest, amounting, at the date of the report, to the sum of \$333.25, together with the costs of this action, to be adjusted.

And judgment was ordered and awarded accordingly.

These conclusions of fact and of law were severally accepted to, and an appeal was brought, by the defendant, from the judgment entered upon the report.

Boies & Thomas, for the appellant.

J. C. Ormsby, for the respondent.

By the Court, POTTER, J. The questions discussed in this case involve, necessarily, the examination of the facts, to see whether the conclusions of the referee, severally, can be sustained. If the conclusions of fact can be sustained, the conclusions of law, as found by the referee, are the necessary consequence. Whenever in the facts found, it is seen that there has been a conflict of evidence by the witnesses, it is too well established law to require discussion, or citation of authority, that the finding

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of the referee must be sustained. He saw the witnesses, observed their manner and dispositions in testifying, and had opportunities of learning their characters for veracity which the court cannot have. And this is most especially true, when, as in this case, the referee possesses in an eminent degree, experience in the trial of causes, and qualifications as a jurist to appreciate and weigh evidence, and draw legal conclusions therefrom.

Let us, then, take the conclusions of fact separately, and see if there is evidence in the case to support them. The first conclusion is, that the defendant, about the month of December, 1867, stated and represented to the plaintiff that he had the agency for the sale of Weed's sewing machine for the county of Saratoga, and the right to sell and transfer such agency, and offered and proposed to sell and transfer such agency to the plaintiff. We find the following testimony of the plaintiff to sustain this finding: Theodore Baker, plaintiff, was sworn in his own behalf, and said: "I know defendant; he commenced to deal with me in October, 1867; he had a Weed sewing machine in Stillwater and wanted to sell it, and I bought it. Some time after, in November, he wanted me to sell machines for him, or to buy the agency of him for Saratoga county. After some talk I agreed to buy the agency of him for \$500, for Saratoga county. He represented that it was a fine thing; that he was making money very fast; said he had the right to sell the agency for Saratoga county. He said other parties wanted to buy, but he would give me the preference of it."

The second finding of fact is as follows: That the plaintiff, relying on such statements and representations, and believing the same to be true, agreed with the defendant to purchase such agency of him, and to give him, in consideration therefor, his (plaintiff's) note for \$500, payable in installments, and thereupon did execute and deliver to the defendant such note, as stated and averred in the com-

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plaint herein. The same witness testified as to this, as follows: "He said he owned the agency for Saratoga county and proposed to sell it. I relied on those representations, and gave him my note for \$500. I afterwards became possessed of the note and destroyed it. The note was dated about December, 1867."

The third conclusion of fact is: That an action was brought upon said note before Esq. Wells, as is also stated in the complaint, but no judgment was entered in such action, and a new note for \$300 was given by the plaintiff to the defendant in the place and in lieu of said \$500 note, which latter note was paid by the plaintiff, as is also stated in the complaint. There is the following evidence to support this finding. The defendant testified: "I then went to Schuylerville and left the note in the hands of Esq. Wells for collection. It was sued before Esq. Wells. It came on for trial, and I was sworn as a witness. We then adjourned for dinner. Before we went to dinner, Baker's counsel said we had better settle. Baker said he was ready to settle. I said I was, and we then went to dinner. When we got back to the office, after dinner, Potter again proposed a settlement. Potter was Baker's counsel. I asked Baker how much he would give me to settle. He said he had no money. I said then there's no use trying any further to settle. Baker said he guessed he could get some money, and asked me how much I would take. I took him out of the room; he was then crying, feeling very bad. I asked him if he thought he could get money if we could settle. He said he thought he could secure me. I told him I would take \$300, if he could secure me. He asked me how much time I would give him. I told him thirty days. He offered Tucker as indorser, and I accepted him. He finally sent me his note for \$300 indorsed by Tucker, and that was the last of it." And the plaintiff testified: "After dinner we went back to the justice's office. Potter or some one said we had better

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settle. We went into a room and talked it over and agreed to settle. I was to pay cash or get an indorser. I gave him my note for \$300, with indorser, and I was to keep the agency. He accepted the note, and I paid it at maturity, by check, which I paid." (Defendant admits that the plaintiff paid the note.)

The fourth conclusion of fact is: That said new note for \$300, was made and delivered by the plaintiff to the defendant on the same representations, statements and assurances of the defendant, as were made by him when the first note was given, and herein before stated, and the plaintiff in giving such note, relied on such representations, statements and assurances, and paid the same as aforesaid, without knowledge of their falsity. The following testimony applies to this finding: The testimony of the defendant which was given on the trial before the justice was read on this trial, and on cross-examination there, was as follows:

Cross-examined: "The note was given for my right in the agency of the Weed sewing machine. I sold to the defendant Saratoga county.

Q. What right in the agency of the Weed sewing machine did you have at the time you sold Saratoga county to the defendant? Objected to by the plaintiff as immaterial. Overruled.

A. I had the agency of Saratoga county, and a part of Washington county, to sell the machine. No paper title passed to the plaintiff from me. I held no paper title at the time of transfer, from the company, nor anybody else. The company gave me the right to sell sewing machines in those counties."

In the testimony of the defendant, given before the referee, speaking of the plaintiff, he said: "He wanted to know what I would take. I told him \$500. I then took dinner with him. After dinner we went to Tucker's store. He took me one side and said he would take Sara-

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toga county; think we figured some on the population of the county. He said he would give me his note. I wanted an indorsed note. He did not want to give one. I inquired about his circumstances; found them good. He proposed giving a note payable \$50 per month, commencing 1st of January. He then gave me a note for \$500, payable in installments."

The following testimony was given by the plaintiff: "I bought only the agency for Saratoga county. We never talked about any thing else. I never talked about buying his interest in Saratoga county. The first notice I had that Spencer had no agency for the sale of machines was the forepart of June, 1868." The plaintiff also called Frank Baldwin, the traveling agent of the sewing machine company, who says he was authorized to sell machines, make collections and transact other business pertaining to the sale of machines. "I also created agencies, not strictly agencies, but for selling machines." After giving account of several interviews between him and Spencer, the defendant, he said: "In spring of 1868, in May, I was at Cambridge and heard of Spencer's deal with Baker. I afterwards and immediately went to Spencer's house and remarked to him that it was a pretty sharp transaction of his over in Saratoga—alluding to his deal with Baker—and I thought it might get him into trouble. I stated to him that he had no authority to make arrangements in Saratoga county, except to retail machines himself. At the second interview I had with Spencer, I gave him the privilege of selling machines himself, if he did not interfere with other agents. He said, you gave me Saratoga county. I said I did not, only conditionally, and he had not fulfilled. I then told him he must consider his business relations with the company discontinued. He did not claim to have authority from any other person or sources than from or through me. I did not go immediately from Cambridge to Spencer's; I went to New

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York first. I made no other arrangements with him after this."

Cross-examined: "I was appointed agent for the company in June, 1867. When I spoke to Spencer about selling in Saratoga county, I don't know that the company had any agent in Saratoga county. It is my impression they did have, but I cannot give the name. Think I told Spencer there were no agents in Saratoga county, then, that would interfere with his arrangements. I also told him he could sell in Saratoga county, if he did not interfere with others; have had no further conversation with Spencer about Saratoga county, except as I have stated.

Q. Did you ever tell Mr. Spencer, at any time or place, that he could have, or did you ever let him have the agency of Saratoga county for the sale of the Weed sewing machine?

A. I did tell him that he could have it. I did not ever let him have such agency. I gave Mr. Spencer permission to sell our goods in Saratoga county, but nothing exclusive; nothing that prevented us from appointing any one else; never gave him any exclusive agency; talked of it in case his brother came from Chicago.

Cross-examined: I gave Mr. Spencer the refusal of the agency of Saratoga county a week, or for some certain time. I think it was a week."

The plaintiff further testified: "I first became suspicious when he came on and hurried me up for the cash. I had not heard a word from the company to make me so. I had a suspicion that there was something wrong; I did not know what; that he had misrepresented as to the machines. Had no suspicion then as to his not having the agency. I supposed that was all right. I made inquiry of the company as to Spencer's right to sell the agency in Saratoga county. About the 30th of May, made the inquiry at New York by letter. This was the first I knew on the subject. I then had suspicions that he had no right to

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sell the agency. I had then had that suspicion about ten days. I got it from Frank Baldwin, the witness. He volunteered it."

The fifth finding of fact was as follows: That the defendant had not, in fact, any agency for said machine for said county of Saratoga, to sell and transfer, and his representations, statements and assurances in that regard were false and fraudulent, and said notes were, and each of them was, fraudulently obtained, and were without consideration and void.

The plaintiff testified that the first notice he had that Spencer had no agency, was the forepart of June, 1868; this was after the \$300 note had been given. One Sidney L. Clark, secretary of the Weed Sewing Machine Company, was examined on commission, and had the following interrogatory administered to him:

Fourth interrogatory. As secretary of said company, do you know, and can you state who were its agents in the sale of the sewing machines of said company, having territory duly allotted to them by said company for and during the year 1867? If yea, was said defendant, William H. Spencer, one of said agents during any portion of said year, and in what towns or counties within the State of New York, and during what portion of said year 1867?

"To the fourth interrogatory, he saith, yes. William H. Spencer was never an 'agent' of Weed Sewing Machine Company, but as appears, and as on our books, he was allotted the town of Greenwich, Washington county, New York, for the sale of our machines, in October, 1867, for so long a time as he did the business satisfactorily."

I have thus selected from the mass of evidence in the case, such portions thereof as tend to sustain the findings of the referee; and standing alone, it seems sufficient. It is not the duty of the reviewing court to go further. If, from the evidence on paper, it even appears that the weight of evidence is against the finding, unless such

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weight is so striking and palpable as to excite surprise, the appellate court will not interfere so far as to reverse. This is not such a case. True, there is some striking conflict, and doubtless much exaggeration, and testimony greatly and clearly influenced by feelings of interest; but who so competent to judge of all this as a competent and fair referee who has had the opportunity to witness the feeling and observe the manner and conduct of the witnesses. Besides, there does not seem to be any moral injustice in the result of this case, which should call for an excessive jealousy on the part of the court against these findings. It is clear the defendant sold to the plaintiff, and received his pay for it, a thing to which he had no title, and for which he had paid nothing. He sold the plaintiff an agency for Saratoga county. He knew he had no such agency to sell; the plaintiff did not know it. The plaintiff supposed he was buying something—a franchise, a privilege, a right that was transferable—and the exclusive right to exercise it within the territory of Saratoga county. He was misled as to this, and the defendant must have known that he was misled, and misled by himself; and he took the plaintiff's money while the plaintiff was acting under this belief. Common justice demands that he should restore it; it was ill gotten gain. There were several objections taken to the rulings of the referee on the trial, and to the admission of evidence; and especially to the refusal to strike out answers to interrogatories; but they are not of sufficient merit to require a reversal of the judgment, and need not be discussed at length. I think the judgment should be affirmed.

[SARATOGA GENERAL TERM, JUNE 6, 1870. *Rosekrans, Potter, Boakes* and *James*, Justices.]

PHEBE FOOTE vs. EMILY E. FOOTE and others.

It is an established rule of equity, that where trust and confidence are reposed by one party in another, and the latter accepts the confidence or trust, equity will convert him into a trustee, whenever it is necessary to protect the interest of the party so confiding, and do justice between them. Certain premises were conveyed to the plaintiff's husband, the consideration therefor being mainly paid by the plaintiff. Subsequently, in 1844, for the purpose of protecting the property, and of keeping it for the plaintiff's use, the plaintiff and her husband conveyed the same to S. F. and O. F., without consideration. S. F. then conveyed the same to O. F. without consideration, upon a parol agreement that the grantee should hold the same for the plaintiff's benefit. After the execution of the deed to him, G. F. always recognized, so long as he lived, the fact that the premises belonged to, and were the property of, the plaintiff, and that he held the same simply for her benefit. The plaintiff, with her husband, had for more than 20 years held uninterrupted and undisputed possession of the premises and paid taxes thereon. In 1854, G. F. made a will, by which he devised the premises to the plaintiff. In 1858 he was married to the defendant E. F., and had issue, the defendant C. F., and died in 1864. The plaintiff claimed the premises as belonging to her, in fee, and the defendants claimed that G. F. was the owner thereof, and that upon his death his widow became entitled to an estate in dower therein, and his daughter C. F. to an estate in the remainder, in fee. There were no creditors whose rights were involved.

Held, 1. That the transaction was simply the naked transfer of the nominal title of the property to G. F. to be held without interest in him, for the benefit of the plaintiff.

2. That the referee having found, as a fact, that G. F. in taking a deed of the property, intended in good faith to hold it in trust, as the protector of the plaintiff's rights, and only for her benefit, the court would not permit those claiming under G. F. to insist that he held it absolutely as the true and lawful owner.
3. That had G. F., at any time during his life, attempted to dispossess the plaintiff of the estate he so held nominally for her benefit, a court of equity would have restrained him, upon application, and, upon demand, have compelled him to convey the title to her.
4. That the section of the statute relative to fraudulent conveyances, (2 R. S. 184, § 6,) which requires that every trust or power over or concerning lands shall be by deed or memorandum in writing, had no application to the case.
5. That it was no objection to the granting of relief to the plaintiff that there was no written agreement between her and G. F. That equity made the latter a trustee *ex maleficio*.
6. That the defendants could interpose no defense of the statute of uses and trusts, or the statute of frauds, that G. F., through whom they claimed, could not set up. That it would be fraudulent in him to deny the plaintiff's

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equitable title to the property; and a court of equity would not allow him to set up either of those statutes to be used as instruments of fraud.

Implied and resulting trusts are, from their very nature, excepted from the provisions of the Revised Statutes relative to uses and trusts.

Their existence, generally speaking, can only be established by parol evidence; and it requires the power of a court of equity to compel the performance of such implied agreements, and to protect the rights and interests of the *cestui que trust* therein. This power has, in no respect, been abridged or impaired by the Revised Statutes.

THIS was an action in equity, in effect to remove a cloud from the title to certain premises in Chenango county, claimed to belong, equitably, to the plaintiff, but which were claimed by the defendants to be owned by them under legal title. The action was referred to a sole referee, who reported in favor of the plaintiff. The facts will sufficiently appear in his report, which is as follows:

That previous to the year 1844, the premises described in the plaintiff's complaint were conveyed to Luther Foote, the husband of the plaintiff, and that the consideration therefor was mainly paid by the plaintiff. That on the 2d day of November, 1844, for the purpose of protecting the property and of keeping it for the plaintiff's use, Luther Foote and Phebe Foote, his wife, conveyed the same to Sherman Foote and Oscar J. Foote without consideration. That said deed purported to be for the consideration of \$400. That afterwards, and on the 15th day of August, 1849, Sherman Foote deeded the same to Oscar J. Foote, without consideration, for the same purpose; such deed purporting to be for the consideration of \$200. That afterwards Oscar J. Foote conveyed the same to Geo. L. Foote without consideration, and with the agreement that he should hold the same for the plaintiff's benefit; the deed was dated October 9, 1850; consideration stated in deed was \$335. That after said deed to George L. Foote, he always recognized, so long as he lived, the fact that the said premises belonged to, and were the property of, the plaintiff, and that he held the title simply

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for her benefit. That the said Oscar J. Foote and George L. Foote were the sons of the plaintiff. That the plaintiff, with her husband, has for more than twenty years last past held uninterrupted and undisputed possession of said premises and paid taxes thereon. That about the first day of May, 1854, said George L. Foote made a will by which he devised said premises to the plaintiff. That about November, 1858, said George L. Foote was married to the defendant Emily E. Foote, and afterwards Carrie B. Foote was born of such marriage. That on the 20th of September, 1864, George L. Foote died, in the State of Virginia.

The referee found, as conclusions of law, that the title of George L. Foote to the premises in question, was a nominal title, and that he held the same for the plaintiff, and for her benefit. That the marriage of George L. Foote, and the birth of Carrie B. Foote, worked a revocation of said will. That the defendants had no interest in said premises, except a nominal one. That the plaintiff was entitled to the relief demanded in the complaint, without costs to either party.

From the judgment entered on this report the defendants appealed.

D. M. Powers, for the appellants.

J. W. Glover, for the respondent.

By the Court, POTTER, J. George L. Foote, by agreement, held the premises in question, without having paid any consideration therefor, for the benefit of the plaintiff, the plaintiff originally having paid, mainly, all the consideration that had ever been paid therefor—that is, by paying a mortgage that had been thereon. There are no creditors whose rights are involved in the case. The de-

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defendants can claim no better title than George L. Foote held to the premises.

The defendants now claim that George L. Foote, at the time of his death, was the lawful owner of the said premises, and that upon his death, the defendant Emily E. Foote, his widow, became entitled to an estate in dower therein, and the defendant Carrie B. Foote to an estate in the remainder in fee. In pursuance of the agreement by which George L. Foote held the title, the plaintiff has been for twenty years in the uninterrupted and undisputed possession of the premises, exercising acts of ownership over it, and paying the taxes thereon. And during that time she was recognized as the owner thereof, by George L. Foote; he claiming to hold the title simply for her benefit. In confirmation of this agreement, and of the right of property in the plaintiff, and to secure the title to the plaintiff, which he so nominally held, Geo. L. Foote, before his death, and as it happens, also, before his marriage, made his last will and testament, devising the said premises to his mother, the plaintiff. Had George, at any time during his life, attempted to dispossess the plaintiff of the estate he so held nominally for her benefit, a court of equity would have restrained him, upon application, and upon demand, have compelled him to convey the title to her. His attempt to do so would have been an attempt to commit a fraud upon his *cestui que trust*, which a court of equity would not allow. His widow, and his heir at law, occupy no better status in court than their intestate would have done, if living.

This is the rule of law as well as of equity, independent of any embarrassments arising from the statute in relation to trusts. It must be remembered that the plaintiff was not the immediate grantor of George L. Foote, nor does it appear that the conveyance to him was intended as an evasion of law, or for an object against public policy. There was no consideration paid by George, nor any received by

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the grantors, his brothers Oscar and Sherman Foote, from anybody. It cannot, therefore, be said that there was any valuable consideration passing between the parties, though the sum of \$400 was named in the deed. It was simply the naked transfer of the nominal title of this property to be held by George, without interest in him, for the benefit of his mother, the plaintiff. This was such a title that a judgment against George could not fasten upon it as an effective lien. (*Siemon v. Schurck*, 29 N. Y. 598.)

The statute by which this trust is claimed to be void is 2 *Revised Statutes*, (*marg. p.* 134, 135, § 6,) which requires that every estate or interest in lands, or any trust or power over or concerning lands, shall be by deed or memorandum in writing, to be subscribed by the party creating, granting, assigning, surrendering or declaring the same. But the 7th section of the same statute declares that the preceding 6th section shall not prevent any trust from arising by implication or operation of law. The 6th section has, therefore, no application to the case in question.

But by the statute of "uses and trusts," *implied* and resulting trusts are not included in, or affected by, the provisions of that article; it does not extend to them. (1 *R. S.* 728, § 50.) They are, and must necessarily be, excluded, from their very nature. (*Astor v. L'Amoureux*, 4 *Sandf.* 524, 529.) Their existence, generally speaking, can only be established by parol evidence; and it requires the power of a court of equity to compel the performance of such implied agreements, and to protect the rights and interests of the *cestui que trust* therein. This power has in no respect been abridged or impaired by the Revised Statutes. It is an established rule of equity, that where trust and confidence are reposed by one party in another, and such other accepts the confidence or trust, equity will convert him into a trustee, whenever it is necessary to protect the interest of the party so confiding, and do justice between them.

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We cannot doubt, if we advert to the circumstances under which George L. Foote took the conveyance of this property, viz: the habits of the father—the industry, the means possessed by the mother—and the desire of the whole family to place the title where it could be preserved from being squandered or lost—his paying no consideration therefor—declaring, for a period of twenty years, that he held it for the benefit of his mother—allowing her all that time to enjoy its use, to pay its taxes—calling it her property—making his will and devising it to her; I say we cannot doubt that he intended in good faith to hold it in trust, as the protector of her rights, and only for her benefit. If this is the fair conclusion from the facts, this being the conclusion of fact of the referee, we cannot now permit those who claim under him to insist that he, George L. Foote, held it absolutely as the true and lawful owner.

If we are right in the views we have taken of this case, it is no objection that there was no written agreement between George L. Foote and his mother, the plaintiff. The law of equity makes him a trustee *ex maleficio*. (*Ryan v. Dox*, 34 N. Y. 307.) The defendants can interpose no defense of the statute of uses, or the statute of frauds, that their predecessor in the title could not set up. It would be fraudulent in him to deny his mother's equitable title to this property; and a court of equity would not allow him to set up either of those statutes to be used as instruments of fraud. (*Ryan v. Dox*, *supra*.)

The various objections to parol proof of this trust, and exceptions taken to their admission, were not well taken. The objection taken to the testimony of Oscar Foote, on the ground that he was an assignee of the property in question—however good it might be if standing alone—is not sufficient cause for reversing the judgment. The fact testified to by him was abundantly proved by other witnesses, and there was no controversy about the facts, and

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no conflict requiring facts to be weighed. The defendants offered no evidence.

The judgement should be affirmed, with costs.

[THIRD DEPARTMENT GENERAL TERM, at Plattsburgh, July 5, 1870. *Miller*, P. J., and *Potter and Parker*, Justices.]

 JOHN H. DIVINE *vs.* GILBERT J. DIVINE.

In an action upon a promissory note, between the original parties to it, the consideration may be inquired into, on the trial; and it is subject to the equities existing between the parties.

A promissory note, given for a part of the consideration money of premises described in an executory agreement for the sale thereof, dated the same day, payable on the day of the delivery of the deed, and being a part of the same transaction, may be read and interpreted with the agreement, as a part of it, or as a waiver of its terms, to that extent.

Such a note is a substitute for the payment of the sum agreed to be paid at the time fixed for the execution of the deed, and until paid, that part of the agreement is not performed. It is a collateral and simple promise to pay the same money mentioned in the written agreement. Its only real effect is to postpone the payment of the unpaid part of the purchase money until the day the deed is to be executed.

And the purchaser having omitted to pay the sum specified in the agreement, at the time it became due, and an action therefor being brought by the vendor; *Held* that the plaintiff was bound to prove, on the trial, that before suit brought he had offered to comply with the agreement on his part; that is, that he had offered to convey the premises to the defendant on receiving the balance of the purchase price.

Held, also, that the payment of the purchase money, and the execution of the deed being dependent acts, and the plaintiff not having shown an offer to convey, he had failed to make out a cause of action, and should have been nonsuited.

In such an action, parol evidence tending to show that the plaintiff not only abandoned the agreement on his part, but that there was a failure of the consideration of the note sued upon, in that the plaintiff had sold the land to another person, and that he had done acts that estopped him from prosecuting the defendant upon the note given for the unpaid purchase money, is competent for that purpose; and is not open to the objection that it is intended to change or vary the terms of a sealed agreement.

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THIS action was commenced in a justice's court, upon a promissory note for \$150, dated April 15, 1868, payable 1st of November, 1868, with interest. The note was given by the defendant to the plaintiff; the consideration of it was for part payment of lands agreed to be purchased by an executory contract between the parties, under their hands and seals, of the same date as the note. There was judgment for the plaintiff, in the justice's court, and an appeal to the county court, where the cause was again tried by a jury.

By the terms of the executory contract, a mortgage upon the land was to be assumed by the defendant as part payment; the remainder of the purchase money was to be paid 1st of November, 1868, at the same time the note was to become due. On which day, by the said agreement, the plaintiff was to give the defendant a good and sufficient warranty deed of the premises, free and clear of all incumbrance except said mortgage. In August, 1868, before the note became due, the plaintiff called on the defendant to secure the note, which the defendant refused to do, alleging that there was not as much land as he expected; that there were but seventy-five instead of ninety acres. The defendant testified that at this interview between him and the plaintiff, the plaintiff told the defendant, if the latter would get the land surveyed, he (the plaintiff) would pay the bill for surveying, and if it fell short of ninety acres, he could not hold the defendant on the note, and he would give it up. The plaintiff objected to the evidence on the following grounds:

1st. The evidence directly contradicts the terms of the written agreement, under which the defendant went into possession.

2d. The evidence can constitute no defense to the action.

3d. There is no fraud or false representations charged in the complaint.

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4th. The evidence is immaterial and improper, and can in no way affect the issue to be tried.

5th. That the note was never delivered to the defendant, and that no parol contract or agreement between the parties, could in any way cancel the instrument.

The court made no ruling on these objections at the time, and the witness continued to testify, that the plaintiff said, on that occasion, if he could sell the land to one Gildersleeve, on certain terms named, he would throw up the contract and give the defendant up his note. Certain other particulars were named, as a variation of terms, not necessary to mention. Afterwards the defendant had the land surveyed; it turned out to be only seventy-five acres; fell short fifteen acres; of which the defendant informed the plaintiff. The defendant further testified: "We then made an agreement that we would throw up this contract, and that he should give me up this note." * * "In March following he deeded the premises to Gildersleeve. I gave up the premises." * * "This agreement to throw up this written contract was in August, 1868." "He did not give me the note at that time, for the reason, as he said, that he did not have it with him. This agreement was not put in writing. After he had conveyed the premises to Gildersleeve, and before this suit was commenced, last spring, I went to the plaintiff's house and offered him this contract and demanded this note." * * "He refused, and said he would have the whole amount of the note, or nothing."

Here, again, the plaintiff objected to the evidence, on the grounds before stated, and the court then excluded it, and the defendant excepted.

Gildersleeve was sworn as a witness for the defendant, by whom he proved a sale and conveyance by the plaintiff, of the premises to his mother, and offered to prove that she assumed the mortgage on the premises for \$900, and paid \$600 in money; but the plaintiff objected to this,

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and the judge excluded it, and the defendant excepted. The defendant also offered to prove, by this witness, that at the time the plaintiff conveyed the premises to Gildersleeve, he, the plaintiff, told her that he had, by an agreement with the defendant, rescinded the contract of sale of the land to him, and that the defendant was occupying it as tenant. This was also objected to by the plaintiff, and excluded by the court, and the defendant excepted.

There was further evidence, by the defendant, that at the time of the agreement of the plaintiff to throw up the contract, and give up the note, it was further agreed between them that the defendant should allow the plaintiff a reasonable rent that year for the premises, and that the plaintiff was to allow the defendant for improvements made on the place. This is also a part of the testimony that was excluded. It is also a part of the evidence that the defendant was in possession under one Hill, at the time he made the written contract with the plaintiff. There was no change of possession. Hill conveyed to the plaintiff.

The defendant asked the court to submit the case to the jury, upon the evidence, as a question of fact, whether the parties mutually agreed and intended to abandon the written contract for the sale of the lands to the defendant, and to assume the relation of landlord and tenant, and whether the plaintiff in consideration thereof, and in consideration of a mistake as to the quantity of the land, agreed to cancel the note in question. He also asked the court to charge the jury that if such was the intention and agreement of the parties fairly entered into and acted upon by both, the plaintiff was not entitled to recover in this action the amount of the note in question. The court refused so to submit the case to the jury; also refused so to charge; and held that there were no questions of fact to go to the jury. To each of which refusals and rulings, separately, the defendant excepted. The defendant also

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asked the court to charge the jury that the facts proved constituted a defense to the note. The court refused so to charge, and the defendant excepted.

The court then ordered the jury to render a verdict for the plaintiff for \$166.62, to which the defendant excepted. The jury so found. Afterwards, on motion of the defendant, upon a case and exceptions, the said court set aside the verdict and ordered a new trial; from which order the plaintiff appealed to this court.

Benjamin Low, for the plaintiff.

T. F. Bush, for the defendant.

By the Court, POTTER, J. This action being upon a note, between the original parties to it, the consideration could be inquired into upon the trial, and it was subject to the equities existing between the parties. The note was given for a part of the consideration money of the premises described in the executory agreement; was dated the same day; was part of the same transaction; and may be read and interpreted with the agreement, as a part of it, or as a waiver of its terms, to that extent. The note was a substitute for the payment of the sum therein agreed to be paid at the time of the execution of the deed, and until paid, that part of the article was not performed. It was a collateral, and simple promise to pay the same money that was mentioned in the sealed agreement. Its only real effect was to postpone the payment of the unpaid part of the purchase money, until the day the deed was to be executed. On that day the parties stood in the same relation towards each other, as to their rights, as if the promise in the note had been in the agreement; or, in other words, the plaintiff waived the first payment until the day he was to perform on his part by giving a deed. The defendant having omitted to pay the sums specified

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in the agreement, at the time they became due; and the plaintiff, after all payments had become due, having brought his action for a part of the purchase money, was bound to prove, on the trial, that before suit brought, he had offered to comply with the agreement on his part; that is, that he had offered to convey the premises to the defendant on receiving the purchase price, or a readiness or willingness to convey. On the 1st day of November, 1868, the whole unpaid purchase money was due; on that day the plaintiff agreed to convey. The payment of the money and the execution of the deed, then, became dependent acts. These facts appeared on the trial, and were uncontradicted. The plaintiff failed to make out a cause of action, and should have been nonsuited. The judge directed the jury to find a verdict for the plaintiff. This was error, and there was an exception. (*Beecher v. Conradt*, 13 N. Y. 108. *Johnson v. Wygant*, 11 Wend. 48. *Grant v. Johnson*, 5 N. Y. 247. *Williams v. Healey*, 3 Denio, 363.)

This view is independent of that taken by the judge on the trial; or the judge on the motion for a new trial. Indeed, the case was tried upon another, and entirely different theory, on both sides. The evidence ruled out, by the judge below, was, much of it, material evidence, and constituted a good defense to the action. The abandonment of the agreement by the plaintiff, his breach of the agreement on his part, by the putting it out of his power to perform, by conveying the premises to another, and putting such other in possession and afterwards bringing an action, in its effect, to compel the other party to perform on his part, has not the savor of equity or of justice to sustain it.

I think the court below was mistaken in assuming that the parol evidence offered was intended to change or vary the terms of a sealed agreement. The testimony was competent to show that the plaintiff not only abandoned

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the agreement on his part, but that there was a failure of consideration of the note sued upon, in that the plaintiff actually converted to his own use the consideration for the promise made by the defendant in the note sued upon; and that the plaintiff had done acts that estopped him from prosecuting the defendant for the consideration of the note.

If these views, or either of them, are sound, the order of the county court, ordering a new trial, should be affirmed, with costs to the defendant.

Order affirmed.

[THIRD DEPARTMENT, GENERAL TERM, at Plattsburgh, July 5, 1870. *Miller, P. J.*, and *Potter and Parker*, Justices.]

THE PEOPLE, *ex rel.* Jeremiah Cooper, *vs.* NEWCOMB FIELD.

A complaint under the statute relative to "forcible entries and detainers," which alleges that the complainant "had a good and legal right and estate to said premises, and that he still has a legal right to the possession of said premises," does not state the right, but the legal conclusion; and is therefore not a compliance with the statute; which requires that the complaint shall show that the complainant has some estate in the premises, then subsisting, or some other right to the possession thereof, *stating the same*.

That being a statute proceeding, and the authority to proceed derived from the statute, a strict compliance therewith is required; though this objection may be waived by omitting to make it in proper time.

H. being the owner of a lot, gave permission to F. to remove on to it a building owned by F. There was no agreement as to the time it should remain there, or for the payment of rent. Subsequently, H. conveyed the premises to third persons, who made an executory contract with the defendant and C. F. for the sale and conveyance of the premises to them, with the right of immediate possession; and they took possession. C. F. afterwards released his interest to the defendant. The latter, wishing to build upon the lot, requested F. to remove the said building, which F. agreed to do; and he consented that the defendant might excavate the earth up to the building; and the defendant did excavate up to the side, and in front of, the building, without objection. Afterwards, F. sold such building to the relator, by a

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written contract stating that the building should remain where it was, and F. retain the possession until the price was paid, when he was to give possession to the relator. F. remained in possession, under the relator, for some time, when he removed most of his things, and gave the key to the relator. The defendant subsequently removed the building from the premises, into the street.

- Held*, 1. That the relator's possession, in law, if he had any possession, was precisely the same as, and no better than, that of his vendor, F. That the possession of F. was either that of a mere licensee, or as a tenant at will. And that whatever his interest had been before the sale to the relator, it had in part been surrendered to the defendant by F.
2. That F. knew as a fact, and was bound to know in law, that the defendant had all the rights that H. possessed when he, F., moved his building upon the premises.
3. That F., in law, could not deny the title of H. under whom he entered into possession; neither could he deny the title of H.'s grantees or alienees.
4. That if F. was a tenant at will, and if the relator could take a conveyance of such a tenure, the tenancy was destroyed by setting up the title of a third person, in hostility to the title under which he held, or went into possession.
5. That if there had ever been a tenancy at will, it was such an one that it had been terminated by the request of the defendant to remove the building and end the tenancy, and by the consent of F. to do so, and a surrender of a part of the premises by him, in pursuance of such request.
6. That the entry of the landlord, after this, was in pursuance of a legal right to enter; that he was revested with the right of possession, and could not be a wrongdoer in entering; and, as a legitimate consequence, could not be guilty of forcibly detaining that which was his own; having committed no act of violence upon the relator, or breach of the peace with a multitude of people, and with a strong hand.

THIS was a proceeding by the relator under the statute entitled, "Of forcible entry and detainer," instituted before the county judge of Madison county, to obtain possession of a lot in the village of Oneida, in said county. The complaint alleged "that Newcomb Field, of Durhamville, at the village of Oneida, in said town of Lenox, in the county of Madison, on the 9th day of June, 1863, at about two o'clock in the morning, did unlawfully make a forcible entry into the lands and premises of this complainant, to wit: Bounded on the north by Phelps street, east by the Oneida feeder, on the south by State land, and on the west by the street; it being about twenty-six feet

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wide on Phelps street, and about twenty-eight feet deep, on which stands a shop, a building of the said complainant; and that said Newcomb Field did then and there (with a large force of men under and in his employ) violently, forcibly and unlawfully, and with strong hand, eject and expel this complainant from his said lands and premises, and forcibly and violently, and unlawfully taking up said shop or building by main force, and removing said building off of said premises into said Phelps street, and taking possession of said land, and holds this complainant out of the possession of said land and premises.

And this complainant further shows, that he and his grantor have been in the quiet and peaceable possession of said premises and shop for many years, and for more than five years, and had a good and legal right and estate to said premises, and that he still has a legal right to the possession of said premises; and that the said Newcomb Field still unlawfully and forcibly withholds and detains the said lands and premises from said complainant, against the form of the statute in such case made and provided."

An inquisition was taken before the county judge and a jury. The counsel for the said Newcomb Field thereupon made the following objections to the complaint in this proceeding, viz: 1st. The complaint does not set forth the title of the complainant to the premises in question, but merely states a conclusion of law. 2d. The complaint states a conclusion of law as to the title, instead of setting out the facts; which objections were overruled, and to such ruling the said Field by his counsel excepted. The inquisition found the defendant guilty of forcible entry and forcible detainer. The proceedings were moved into the Supreme Court by certiorari, and the traverse ordered to be tried at the circuit. At the circuit the plaintiff was nonsuited. The general term, upon appeal, granted a new trial. It was tried the second time, resulting in a verdict for the defendant. Upon the second appeal, the general

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term again ordered a new trial. On the third trial the jury disagreed. On the fourth trial the jury found the defendant not guilty of a forcible entry, but guilty of a forcible detainer. After the fourth trial a motion was made, at the special term, to quash the proceedings for the defect in the complaint, which was denied, and the defendant appealed from the order. This appeal, together with exceptions taken to the rulings and charge of the judge, upon a case, were again taken to the general term, and another new trial ordered upon the case, but the order made at special term was affirmed. On the fifth trial, a verdict was given by the jury against the defendant, for forcible detainer, and in his favor as to the forcible entry. From this trial, a case and exceptions were made, and that was now before the court for review. The other facts in the case sufficiently appear in the opinion.

D. Pratt, for the appellant.

B. F. Chapman, for the relator.

By the Court, POTTER, J. The law of this case, as pronounced at the general and special terms, under somewhat varying states of fact, has greatly complicated our review. Desiring to observe all proper regard for the adjudications of the court, whose decisions we so highly respect, and which, so far as they are applicable, we must hold to be the law of this case, we are met with some apparent conflicts of theory between the rulings at the circuit, and the law as I understand it to have been announced in the reported decisions of the same case. (52 Barb. 198. 1 Lansing, 222.)

The third section of the statute, entitled "Of forcible entries and detainers," (2 R. S. 508,) requires that the complaint shall show that the complainant has some estate

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in the premises, then subsisting, or some other right to the possession thereof, *stating the same*.

The relator alleged, as is seen, "that he had a good and legal right and estate to said premises, and that he still has a legal right to the possession of said premises." This is not stating the right, but the legal conclusion. This was held in *52 Barbour*, not a compliance with the statute. This is a statute proceeding; the authority to proceed is derived from the statute; and in such cases, strict compliance is required, though this objection may be waived by omitting to make it in proper time. The objection to the sufficiency of this complaint was taken before the county judge, and the objection overruled. In the same case, in *1 Lansing*, the court held that, in such case, if the objection is taken before the county judge and overruled, after the proceedings are brought into this court by certiorari, it is competent for the defendant, and he should renew the objection before he traverses the inquisition. This was done on the last trial and traverse of this case; and the objection was overruled by the circuit judge. It appears to me that on this review, we should regard the decisions of the general term as the law of the case in this court, and I think it would be unbecoming in us, even did we doubt its soundness, to overrule such decisions. The objection, then, so taken, should be held good, and the ruling to be error. (11 *Wend.* 157. 7 *How. Pr.* 441. 11 *N. Y.* 94.)

There are certain undisputed facts in this case which seem to me to have a controlling influence upon the case—influence in settling the law—and are most material to its determination.

Many years prior to the year 1860, one Sands Higginbotham was, or claimed to be, the owner, and was in possession, of certain lands in Oneida village, including the premises in question, and by an agreement made by him with one James Fish, the latter was permitted to remove

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a building owned by him, upon the premises in question. Nothing was said about the time it might remain, or when it should be removed; no agreement was made to pay rent; Higginbotham refused to receive any; and Fish made no agreement to pay rent. Fish removed his building partly upon the premises and partly in the street.

On the 15th of February, 1860, Higginbotham and wife conveyed by deed to Nathan B. Wilber, Albert E. Coe and others, in trust, certain premises and real estate in said village, which included the premises in question. On the 31st of October, 1861, a majority of these trustees made an executory contract with the defendant and one Charles Field, for the sale and conveyance to the latter of a portion of the said trust property, and which contract included, in its description, the *locus in quo*. This contract, in terms, gave the vendees possession of the premises so agreed to be conveyed, and they entered into the possession, for the purpose of erecting a building upon the premises, in pursuance of the said agreement. Charles Field afterwards released to the defendant. In the spring or summer of 1862, the defendant, desiring to build a block of stores upon the lot, requested Fish to remove the building in question from the lot, which Fish agreed to do, and made preparations by a contract to do so, and he obtained the implements for that purpose, and consented that the defendant might excavate the earth up to the building he occupied, and the defendant did so excavate up to the side, and in front, of the building, without objection. After this, and on the 31st of July, 1862, Fish sold this building to the relator, Cooper, by a written contract, stating that the shop (the building in question) should remain where it was, Fish to retain the possession, until the money was paid; and when paid, he was to render up possession to the relator. Fish remained in possession under the relator, until about the 1st of May, 1863, when he removed his things from the shop, except

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a few trifling articles, and gave the key to the relator, whose possession from that time was the possession of the key, and occasional opening and entering into the shop, and locking up and departing therefrom, until the morning of the 9th of June, 1863, when the building was wholly removed from said premises into the street, by the defendant. The above, I think, are undisputed facts. It may not be material, upon the question of law which these facts present, to add the following; but it may be as well to state it in this connection; that when the relator purchased the building he knew the progress of the defendant's preparation for building, and the extent of excavation then made, to the side, and in front of the building he purchased; and knew that Fish had made a bargain with men to move the shop from the premises; that Fish had actually procured the removal of the hay scales in front of the shop; and the relator also knew that such intended removal was to enable the defendant to erect his block of buildings.

Upon the facts above stated, the relator's possession in law, if he had any possession, was that, exactly, and no better than that of his vendor, Fish, and the relator took subject to all the previous acts of Fish. The possession of Fish was either that of a mere licensee, or as tenant at will. Whatever his interest had been before the sale to the relator, it had in part been surrendered to the defendant by Fish. Fish knew that the defendant held a conveyance, or an agreement for one, with possession under it, in a direct line from Higginbotham, under whom he (Fish) took, and had been in possession. He knew as a fact, and he was bound to know in law, that Field had all the rights that Higginbotham possessed when he, Fish, moved his building upon the premises. Fish had never denied, and in law he could not deny, the title of Higginbotham, under whom he entered into possession. As little could he deny the title of Higginbotham's grantees, or alienees.

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If Fish was a tenant at will, (which I do not assert,) and if the relator could take a conveyance of such a tenure, (which I deny,) the tenancy was destroyed by setting up the title of the State, or of any one else, in hostility to the title under which he held or went into possession. I think the court erred, on the trial, in permitting the relator to show title to the *locus in quo* in any one other than Higginbotham and his alienees. Indeed I think it would have been the duty of the court at circuit to have nonsuited the plaintiff, if the objection had been made on the ground that there had been no forcible entry, in law, by the defendant; but this objection was not in due form made.

Due respect for what the court has settled to be the law of this case, (which was probably not before the judge at the circuit,) makes it unnecessary to discuss the controverted facts which appear in the voluminous case before us. I propose only, further, to notice the exceptions to the charge of the judge to the jury, and the exceptions to his refusal to charge, made to him by the defendant's counsel. I think, in view of the law as settled, that the following paragraphs of the judge's charge which are excepted to, are each erroneous, viz: "The relator was in the actual possession of the premises, and was at the time he went there; that he was in the constructive possession in the morning when he went there, after the building was removed, so as to entitle him to maintain these proceedings."

"The relator has the right to go to the water in the feeder, or at least to the angle of the bank, upon his complaint and the inquisition."

"If the land belonged to the State, then he (the relator) can maintain forcible entry and detainer."

I think the refusal of the court to charge the following propositions, as requested by the defendant's counsel, was also erroneous:

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"Neither Fish nor any one holding under him, can dispute the title of Higginbotham."

"The relator cannot prove, under the complaint and inquisition, that the shop in question was on the land belonging to the State."

"If Higginbotham was in possession of the premises in question, whether the State land or not, if Fish moved the shop on them by the license of Higginbotham, Fish could not controvert Higginbotham's title."

If there had ever been a tenancy at will, it was such that it had been terminated by the request of the defendant to remove the shop and terminate it, and by the consent of Fish to do so, and a surrender of a part of the premises by him in pursuance of such request. The entry of the landlord, after this, was in pursuance of a legal right to enter; he was revested with the right of possession, and could not be a wrongdoer in entering; and as a legitimate consequence, could not be guilty of forcibly detaining that which was his own. He committed no act of violence upon the relator; he committed no breach of the peace with a multitude of people, and with a strong hand.

The case was tried, I think, upon an erroneous theory, and errors are the natural consequence. I do not propose to discuss, from the facts, the distinctions between the actual and constructive possession; whether there may be, in certain cases, forcible detainer, when there has been no forcible entry; whether the building in question was real or personal property; nor where is the true line that separates the property of the defendant from that of the State. Doubtless the jury have passed upon some of these questions; but in my view of the law they were immaterial in this case. The errors we have pointed out are sufficient to direct a new trial.

New trial granted.

[THIRD DEPARTMENT, GENERAL TERM, at Plattsburgh, July 5, 1870. *Miller*, P. J., and *Potter* and *Parker*, Justices.]

THE BOARD OF SUPERVISORS OF THE COUNTY OF OTSEGO *vs.*
JAMES I. HENDRYX and others.

The compensation to a county treasurer, where the board of supervisors have omitted to fix it otherwise, is one half of one per cent for receiving, and one half of one per cent for disbursing moneys, until the commissions come up to \$500; which sum they cannot exceed, except in those counties where other compensations are fixed by law.

In the absence of any act or resolution of the board of supervisors, fixing the compensation of the county treasurer therefor, he is entitled to a commission of one per cent for receiving and disbursing moneys, between the time of the settlement of his account, for the previous year, with the board, in November, and the expiration of his term of office on the 1st of January, thereafter.

THIS action was brought against the defendant Hendryx, late treasurer of Otsego, and the other defendants as his sureties in the official bond for faithful performance &c., to recover \$332.84, claimed to be the balance in the hands of Hendryx as late treasurer. Hendryx claimed it as his legal fees and commissions for services as treasurer. At the expiration of his time as treasurer, 1st of January, 1867, there was in his hands, of money received from taxes in the fall of 1866, \$2665.84, of which he paid over to his successor in office \$2333, leaving the sum of \$332.84, which is the subject of this action. There are no disputed questions of fact. Hendryx received for his services as treasurer, for the calendar year of 1866, the sum of \$800, besides this sum of \$332.84; but \$300 of this amount was received by virtue of a special act of the legislature of 1867; so that by virtue of the law, and of the general statutes, he had received \$500 only, between November 1865, and November 1866.

It was undisputed that Hendryx had been fully settled with and paid for all services prior to the year 1865, and, that at the November session of the board of supervisors he settled his accounts with that board for the past year, in which he had received, as his fees, \$1321.11. And he again settled with the board of supervisors at

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their November session of 1866. And it also appears that at the session of the board in 1866, they "resolved that the county treasurer receive not to exceed the sum of five hundred dollars for his services as county treasurer for the past year." They adding, "such being the extent of the amount allowed by statute in such case made and provided."

The only question in the case was a question of law, to wit, whether the defendant Hendryx was entitled to the commission of one per cent, as commissions or fees, upon the receipt and payment of the sum of \$33,284, received and paid by him, after the settlement with the board of supervisors, in November 1866, and between that time and the expiration of his office, January 1, 1867. This is just the amount in dispute, \$332.84.

The learned judge at the trial ordered a verdict for the plaintiff, for this sum.

E. Countryman, for the plaintiffs.

S. S. Edick, for the defendants.

By the Court, POTTER, J. There is no evidence in this case to inform the court when the fiscal year begins or ends with the board of supervisors of Otsego county, which they adopt in their settlements and allowances of compensation to the fiscal officers of the county, except such as may be inferred from the evidence, that they made their annual settlements with their treasurer at their annual meetings in November of each year, and from the provisions of the statute, (1 R. S. 367, § 2,) which requires them at such meeting "to examine, settle and allow all accounts chargeable against such county, and to direct the raising of such sums as may be necessary to defray the same." It is therefore very clear to my mind that the November meeting of that board is the beginning and end

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of their fiscal year, as well by law, as in practice; and that it is not the official year of the officer to which the compensation belongs. Different counties elect their treasurers at different periods. Besides, the statute provides that in case of death, removal or resignation of such treasurer, the board of supervisors shall appoint, to supply the vacancy. This creates no change in the fiscal year, and no inconvenience in the allowance of compensation; for if the compensation be a fixed sum, the incumbent receives his due proportion for the time he serves, and if he is paid by a commission, it is determined by the amount of moneys he receives and pays out. If we are right in this assumption, then the verdict in this case ought to have been directed for the defendant; for after the settlement made with him in November, 1866, for the preceding year, that is, from November 1865, to November 1866, he received and disbursed for the county the sum of \$33,284. If he was serving for a fixed salary or compensation, then he was entitled to such proportion of a year as passed between the November settlement in 1866, and the time of the expiration of his office; but his salary was not fixed for that period. If his compensation was the legal commission upon the money received and paid out after the last settlement with the board of supervisors, then he was entitled to the sum he retained, \$332.84.

The board of supervisors of Otsego county never fixed the amount of compensation for their county treasurer, as was their duty to do under the act of 1846. This omission did not deprive the treasurer of the right to some compensation; and as they settled with him annually, but produced no evidence of the amounts they allowed him in such settlements, the presumption of law is that he was paid the legal and proper amounts. But there is something stronger than presumption in the case. The board seemed to be well informed as to the amount they

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were authorized to pay, by the law of 1846; for in the year 1864 the board resolved that it appeared that there was justly due to the treasurer \$300; "and whereas the same cannot be paid, by the law of 1846, therefore, resolved, that the said sum of \$300 be paid to said J. I. Hendryx, treasurer, upon an act of the legislature being passed allowing the same; and the legislature is hereby requested to pass such an act;" and in 1867 the legislature did pass such act. It does appear that in the year 1865 the treasurer received \$1321.11 for services on the receipt and payment of \$132,111.04, and perhaps it is to be inferred that he was allowed that sum by the board of supervisors in their settlement, but this does not positively appear. It does not appear what amount he received and disbursed in any other year. The proof of settlement by the board of supervisors with the treasurer, in the fall of 1865, carries with it the presumption that his compensation was included; more especially so, as they had never fixed his compensation as they were required to do by the statute of 1846. It is the further presumption from the resolution of 1864, that they knew the limit fixed by the act of 1846, and the still further presumption that they, as public officers, did not violate the law in their settlement. At the November session of the board, in 1866, they passed a resolution that *for the past year* the treasurer receive *not exceeding* \$500, for his services. This was no fixing of his compensation; it was only fixing an ultimatum beyond which he should not go. It does not appear what amount of money came into his hands during that year. They did not, in this resolution, at all comply with the statute "to fix the amount." He had a right, by the statute of 1846, to receive one half per cent for receiving, and one half per cent for disbursing, unless said commission exceeded \$500. That sum he could not exceed, but he was not entitled to that sum by law, if his commissions did not amount to it. So that their reso-

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lution was a mere statement of what the statute was, without at all fixing the compensation. They say "it shall not exceed \$500;" but do not fix it at that, or any other sum. Their resolution was a perfectly safe one, but was legally useless; it was entirely without effect, and if it could have had any effect, it was confined to his compensation for "the last year," and did not apply to the future. But it is to be presumed that in their settlement with the treasurer in the November session of 1866, they allowed him the maximum provided by law, and in their resolution, \$500. And as conclusive evidence that the November session of the board was the termination of the fiscal year, it appears that at the meeting of the same board 2d of January, 1867, two days after the expiration of his office, called to examine his accounts, their committee reported that the said treasurer had in his hands \$2665.84, *without allowing him anything for his services since the last session.* This committee recommended, however, that the new board of supervisors pay him liberally for such services, in consequence of the large amount he thought necessary to borrow. Here is a distinct acknowledgment for unpaid services not allowed in former settlements. The simple question then is, what is he entitled to for his services after the end of the fiscal year which terminated with the November settlement in 1866?

It does not appear that there were any moneys in his hands at the date of that settlement. It does appear that the sum of \$33,284 came into his hands afterwards. It does not appear that the board of supervisors ever fixed the compensation of their treasurer, except a maximum for the one fiscal year between November 1865 and November 1866. He has a right to some compensation for his services after the last settlement. In case of the omission of the performance of the duty of the board to fix it, what is the compensation by law? I think it entirely clear, and is settled by the statutes of 1846 and 1863, which

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are not in conflict, and both are in force; and it is only necessary, in order to determine this, to read those statutes. In 1846 it was enacted that "the several county treasurers of this State shall *hereafter* receive for their services, *instead* of the fees *now* allowed by law, such compensation as shall be fixed by the respective boards of supervisors of their respective counties, *not exceeding* the half of one per cent for receiving, and the half of one per cent for disbursing, and in *no case* to *exceed* the sum of *five hundred* dollars per annum." In 1863 it was also provided, that "it shall be the duty of the several county treasurers of this State, on or before the first day of April in each year, to pay the treasurer of this State the amount of State tax raised and paid over to them, respectively, *retaining the compensation to which they may be entitled*, and which compensation shall *not exceed* the amount now *authorized by law*, and shall not in *any case* exceed the sum of two thousand dollars."

In the official term of the defendant Hendryx he was acting under the provisions of these statutes; both were in force; but it is not necessary to give them construction beyond the question raised in this case. Neither of these statutes changed the provisions of the Revised Statutes, except where the commissions exceeded \$500; unless the board of supervisors exercised the power of fixing such compensation. They could make it less than \$500. This is all that was intended in the dictum of *The People v. Devlin*, (33 N. Y. 274.) When the commissions exceeded \$500, the act of 1846 limited the previous compensation; when they did not exceed that sum, the per centage was allowed. When the supervisors took no action under the act of 1846, commissions could be charged up to \$500. Statutes must have a reasonable construction. It is not reasonable to suppose that the legislature intended that county treasurers should have no compensation if boards of supervisors neglected to perform their duty

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under the statute of 1846. Assuming, then, that the law of 1846 was in full force in the year 1866, when the defendant Hendryx performed these services, after his November settlement in that year, and that the board of supervisors had omitted to fix his compensation, is he entitled to no compensation? He had received from the county, funds to the amount of \$33,284. It was his duty to receive, and to safely keep, them. His sureties or bail—the other defendants—were responsible that he should perform his duty in receiving and keeping and disbursing these funds according to law. By his discharge of all previous duties, they were discharged from all previous liability. As to such other moneys, and the faithful performance of all other previous duties, there is no evidence of a breach. Can it be; is it reasonable; is it the intent of the statute, that he should be compelled to perform this duty, and he and his sureties be held responsible for its performance, and he receive no compensation for it? Clearly not. If, then, there is a compensation, what is it? Precisely what he retained; no more; no less—one half of one per cent for receiving, and one half of one per cent for disbursing. This is clearly the compensation where the board of supervisors have omitted to fix it otherwise, until the commissions came up to \$500, which they cannot exceed, except in those counties where other compensations are fixed by law.

If I am right in these views, a judgment should be ordered for the defendants in this case, with costs.

Judgment accordingly.

[THIRD DEPARTMENT, GENERAL TERM, at Elmira, September 6, 1870.
Miller, P. J., and *Potter*, Justice.]

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THE PEOPLE, *ex rel.* John Vanderlinden, *vs.* ALEXANDER MARTIN, supervisor &c. and others.

The relator, on the 30th of July, 1863, enlisted into the military service of the United States as a volunteer, and was credited to the town of L., under the call made by the President of the United States on the 14th of April, 1864. On the 13th of August, 1864, the electors of the town of L. at a special town meeting, by resolution, authorized the supervisor, town clerk and one of the justices to issue certificates of indebtedness to the amount of \$300, as bounty, to each and every volunteer who had been or might be thereafter credited to said town; provided he should have enlisted or re-enlisted between the 13th day of July, 1863, and the 1st day of January, 1864, and had received no bounty from said town; upon the production of the proper evidence that the volunteer had been credited to said town of L.

Held that when a volunteer bringing himself within the provisions of the resolution of the special town meeting, presented proper evidence of the facts to the town officers, it was their duty to issue to him a certificate of indebtedness for \$300; and that upon their refusal to do so, a *mandamus* was the proper remedy. PARKER, J., dissented.

Held, also, that the objections to the issuing of such a process—that the relator was a non-resident of the United States, and owed no allegiance to them; that he first enlisted to the credit of another town, and was transferred to the town of L. without his own knowledge or consent—were all technical, and without force.

Held, further, that if the town officers had not met, no other demand of performance could be made than a several demand; and if it was necessary for the officers to meet, to perform their duty, then a demand that they issue a certificate was, of itself, a demand that they should meet for that purpose.

THIS is an appeal from an order made at special term, granting a *mandamus* to the defendants, supervisor, town clerk and justice of the peace of the town of Lisbon in the county of St. Lawrence, commanding them to issue to the relator a certificate of indebtedness of said town, as bounty due for military service, in pursuance of a resolution passed at a special town meeting of said town.

E. C. James, for the relator.

B. H. Vary, for the defendants.

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POTTER, J. It appeared, upon the case made at the special term, that the relator, on the 30th July, '1863, enlisted into the military service of the United States, at Ogdensburgh, St. Lawrence county, New York, as a volunteer private in Co. A, 14th regiment of N. Y. heavy artillery, to serve for the period of three years, and was honorably discharged from said service, to date August 26, 1865, by reason of paragraph 2, special orders No. 718, department of the east, dated June 8th, 1869.

The relator enlisted to the credit of the town of Oswegatchie, in said county, but the defendant Martin, supervisor of Lisbon, claimed him as a resident of that town, and upon the request of said Martin, as supervisor, and in accordance with a statement of the supervisors of that county, the credit of the relator, though without his knowledge or consent, was given to, and applied upon the quota of the town of Lisbon, under calls made by the President of the United States, of April 14, 1864. Afterwards, and on the 13th August, 1864, the electors of the town of Lisbon duly convened in special town meeting, after a preamble reciting the president's proclamation and call, and the liability of that town for her proportion or quota under said call, "Resolved, that the supervisor, town clerk, and one of the justices, be authorized to issue certificates of indebtedness in such amounts as (may) might be desired, amounting in the aggregate to the sum of three hundred dollars to each and every volunteer who has been or may be hereafter credited to said town of Lisbon, provided he shall have enlisted, or re-enlisted between the 13th day of July, 1863, and the 1st day of January, 1864, and has received no bounty from said town, and when the proper evidence shall be received that the volunteer has been credited to the said town of Lisbon." The relator presented the evidence to the defendants severally, that he had been credited to the town of Lisbon as a volunteer, had never received a bounty from the town, and

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demanding his certificate of indebtedness, in pursuance of the said resolution, which was refused, or neglected to be given.

The relator brought himself within the provisions of the resolution of the special town meeting of the town of Lisbon. He enlisted between the 13th July, 1863, and 1st January, 1864, and was afterwards credited to that town as a volunteer. There are no contradictions of these facts, nor of the fact of the town meeting, and the resolution passed thereat. Such meetings were legalized by statute. (*Sess. Laws of 1864, ch. 8, § 22.*)

The objections that the relator was a non-resident of the United States; that he owed no allegiance to them; that he first enlisted to the credit of another town; that he was transferred to Lisbon without his own knowledge or consent, are all technical, and without force. And the objection is immaterial, if otherwise good, (which is not admitted,) that the supervisor had no power to bind his town by obtaining credit for the relator to the town of Lisbon. It was not the supervisor unauthorized, but the vote of the special town meeting, in promising to pay the bounty to all volunteers who should be credited to the town, that created the liability. The benefits of this resolution enured to the relator. Every necessary legal and moral consideration is in his favor, and against the town; it was a debt legalized by statute, even if it was otherwise to be regarded as a mere promise of a gratuity. If it was a mere gratuity, these mere ministerial agents of the town, supervisor, town clerk and justice, have no authority to resist the orders or directions of their principal and superiors, the people. They were in duty bound to issue the town bonds to all such volunteers as were entitled to the bounty voted by the town. No judicial discretion was conferred upon them. Their duty was to obey; not to litigate and question the legality of the acts of the superior body from whom they received the authority and direction to act;

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their resistance is contumacious, and a mandamus is the proper remedy to enforce obedience.

It is not needful for the court to decide whether the officers named to perform this duty compose a board to act officially, or are merely agents of the town to act in the capacity named. It is enough that the duty was not judicial; they were the creatures of the statute, and the agents of the people of their town. It is trifling with their duty to say they had had no meeting; or that they had not been requested to meet, to perform this duty. If they had not met, the demand could not be made of them at a meeting, and they cannot plead their own omission of duty, if it be necessary to meet, as a defense. No other demand could be made than a several demand, and if it was necessary for these officers to meet to perform their duty, then a demand that they issue these certificates was, of itself, a demand to meet for that purpose.

As there was no dispute about facts—no denial of the facts given by the relator—I think the special term was right in ordering a mandamus, and that the order appealed from should be affirmed, with costs.

MILLER, P. J., concurred.

PARKER, J., dissented.

Order affirmed.

[THIRD DEPARTMENT, GENERAL TERM, at Elmira, September 6, 1870. *Miller*, P. J., and *Potter* and *Parker*, Justices.]

THE NATIONAL BANK OF CHEMUNG *vs.* CLARK S. INGRAHAM, impleaded &c.

On the formation of a partnership between S. & I. under the firm name of "J. S.," a note was made by S. in his own name, which he procured to be discounted by the plaintiff, for the purpose of enabling him to pay in his share of the capital. S. did not represent to the plaintiff that it was a firm note; and the payees, as officers of the plaintiff's bank, knew, or had good reason to believe, that the note was not the note of the firm, but was the individual note of S. *Held* that I. was not liable as a party to the note, in any form; and no recovery could be had against him by the plaintiff, as holder thereof.

Held, also, that even if the note had been discounted after the partnership had commenced business, the legal presumption would be that it was the note of the individual who signed it, and not the note of the firm.

That to entitle the holder to recover, in such a case, against the partners, it must go further, and prove either that the money for which the note was given was borrowed on the credit of the partnership; or that it was used, when obtained, in the business of the partnership.

That the burthen of proof was upon the plaintiff, to show that the note was discounted upon the credit of the partnership.

That if the lender did not know of the partnership; or if the money was loaned on the individual credit of the maker of the note; the fact that the money was applied to the business of the firm did not create a liability on the part of the firm, or constitute the lender a creditor of the firm.

THIS is an appeal from a judgment entered upon the report of a referee. The action was upon a promissory note drawn by one John Sibson, of which the following is a copy :

"\$1800.

Elmira, Feb. 5, 1868.

Three months after date I promise to pay to the order of C. M. & H. W. Beadle, eighteen hundred dollars, at the National Bank, Chemung; value received.

(signed)

JOHN SIBSON."

The issues in the action were referred to the Hon. Lucius Robinson, as sole referee, who reported thereon as follows:

In the month of December, 1867, the defendants, Sibson & Ingraham, agreed that they would enter into a copart-

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nership in the clothing business, in the city of Elmira. Articles of copartnership were prepared, dated January 1, 1868, but not signed until the 20th of February, 1868. A store was hired in which to carry on the business, and Sibson went to New York and purchased goods on short credit, and the store was opened for business, on or about the 12th day of January, 1868. The business was conducted in the name of "John Sibson," which was the firm name. The capital contributed by the partners, respectively, was not paid in until the 5th of February, 1868. On the last mentioned day, Sibson made the note mentioned in the complaint, and procured the same to be discounted by the plaintiff, the National Bank of Chemung, for the purpose of enabling him to pay in his share of the capital, and the money so procured was used by him in paying for the goods previously purchased. Sibson, at the time of procuring the said discount, did not represent the said note as being the note of the firm, and it was in fact his own individual note, and not the note of said firm. The firm did not make any notes or procure any discounts. Sibson stated to the officers of the bank, or one of them, that he wanted the money until such time as he could get money due to him from parties in the west. The cashier of said bank requested him to get the defendant Ingraham to indorse the note, and Ingraham, on being applied to in pursuance of such request, refused to make such indorsement. The cashier and assistant cashier of the said bank, with whom the negotiations for said discount took place, knew, or had good reason believe, that the note was not the note of the firm, but was the individual note of the said John Sibson.

The referee found, as conclusions of law, that the defendant Ingraham was not liable as a party to the said note in any form, and that the plaintiffs were not entitled to recover anything against him, in this action; and that the defendant Ingraham was entitled to judgment against the

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plaintiff for his costs of this action. He therefore decided, adjudged and reported that the said defendant Ingraham should recover from the plaintiff his said costs.

S. B. Tomlinson, for the plaintiff.

John A. Reynolds, for the defendant.

POTTER, J. The plaintiff presents in his brief and argument but two objections to the ruling of the referee, on the trial, and we shall assume that he is satisfied with all the decisions except those presented to, and discussed before the court. In order to understand the objections presented, it is proper to say that the defendant Ingraham is sued upon the theory that though not a party, nominally, to the note in suit, he was a party by reason of his being a copartner in business with Sibson, the drawer of the note; the copartnership business being carried on in the name of John Sibson. And the theory of the defense is, that the copartnership was really formed at the date of the note; that the money raised by Sibson upon the note was for the purpose of furnishing Sibson with his share of the capital; and that it was raised and obtained for that purpose, and upon the individual credit of Sibson. The referee has found the defendant Ingraham's theory to be true, as a fact, and there is satisfactory evidence in the case to sustain this finding. It may also be stated as undisputed, that of the two payees named in the note, the one was the cashier, and the other the assistant cashier of the plaintiff; that the money obtained upon the note in question was applied in payment of goods purchased for the copartnership; and that the articles of copartnership were signed, and the capital of the partners furnished, on the 5th day of February, 1868, the date of the note.

On the trial, the defendant Ingraham was sworn as a witness, and testified to having seen this note on the 4th

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day of February, and was requested by Sibson to indorse it, which he declined to do; and that in the afternoon of that day he saw in Sibson's possession a certificate of deposit for \$1800, in the handwriting of H. W. Beadle, the cashier of the plaintiff's bank. Then this interrogatory was put to him: "Was this \$1800, the avails of the note, John Sibson's individual share of the capital of the firm of John Sibson?" To which the plaintiff's counsel objected, as immaterial and incompetent. "It calls for the opinion or conclusion of the witness. It does not appear that the witness has any knowledge as to whether the money was advanced by the plaintiff to Sibson, or to whom, or for what purpose, it was advanced, and the testimony cannot affect the plaintiffs." Which objections the court overruled, and allowed the evidence; and to which ruling and decision the plaintiff's counsel excepted.

A. "It was his share of the capital of the firm; his share was to be \$2000."

This is the first objection that is claimed to be error.

It appears to me that this question called for a fact that was material to the case, viz: whether this money was the individual portion of one of the copartner's capital. If, in answering it, the witness had sworn to an opinion, or to a conclusion, the *answer* should have been stricken out. And it was in the power of the plaintiff, by cross-examination, to test the knowledge of the witness as to this fact. As the answer stood, it purported to be an answer of fact, from knowledge, and a material fact. No objection was made to the form of the question. I do not think this ruling was error.

The second objection arises upon an interrogatory, and answer of John Sibson, the other defendant, who was sworn as a witness for Ingraham, as follows:

Fifth Interrogatory. "Before you negotiated the note, did any of the officers of the National Bank of Chemung, or either of the payees of the note, know for what

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purpose the money was procured by you? If yes, state which ones knew it, and how they knew it. If by information from you, state fully what you said to them, and to whom you said it, and whether your statement was made to them before the note was negotiated by you."

To which, and the answer thereto, the plaintiff's counsel objected, as immaterial and incompetent, on the ground that declarations of Sibson, made to the payees of the note or the officers of the bank, before the note was negotiated, were inadmissible; which objection the court overruled, and received the evidence; and to such ruling and decision the plaintiffs' counsel excepted.

A. "They did; I mentioned to both C. M. Beadle and H. W. Beadle that I wanted the money until such time as I could get money due me from parties in the west; which money I meant to apply to satisfy the note when it became due; this statement was made before the note was negotiated."

I am equally unable to discover any error in this ruling of the referee. It was an inquiry for evidence upon the very point upon which the case, as against Ingraham, must depend. These are all the objections urged to the referee's rulings, upon the trial.

The general objection, that the report of the referee is contrary to law, is only left for consideration. In discussing this question we must assume the facts found by the referee to be true: That the note in question was discounted, and the money procured, to enable Sibson to pay in his share of the copartnership capital; that Sibson did not represent to the plaintiff that it was a firm note; that the payees of the note, as officers of the plaintiff's bank, knew, or had good reason to believe, that the note was not the note of the firm, but was the individual note of John Sibson.

It requires no extended argument to demonstrate that the legal conclusion of the referee was sound and correct.

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Even if this note had been discounted after the copartnership had commenced business, the legal presumption would be that it was the note of the individual who signed it, and not of the firm. To entitle the plaintiff to recover in such case against the partners, they must go further, and prove either that the money for which the note was given was borrowed on the credit of the partnership, or that it was used, when obtained, in the business of the partnership. (*Oliphant v. Mathews*, 16 Barb. 610, and cases cited.) The burthen of proof was upon the plaintiffs, to show that the note was discounted upon the credit of the copartnership. (*Manufacturers' Bank v. Winship*, 5 Pick. 13.) If the lender did not know of the partnership, or if the money was loaned on the individual credit of the drawer of the note, the fact that the money was applied to the business of the firm does not create a liability of the firm. (*Story on Part.* § 139. 5 *Mason*, 176.)

The written contract in this case was made between the plaintiff and Sibson; the avails were for the private benefit of Sibson. The law is well settled, that Ingraham was not liable. Such a loan, though the borrower applied the avails to pay debts of the firm, does not constitute the lender a creditor of the firm. (*Green v. Tanner*, 8 Metc. 411. 15 *East*, 6.) The judgment should be affirmed.

MILLER, P. J., concurred.

PARKER, J., concurred in the result.

Judgment affirmed.

[THIRD DEPARTMENT, GENERAL TERM, at Elmira, September 6, 1870.
Miller, P. J., and *Potter* and *Barker*, Justices.]

CHESTER L. HOBART and others *vs.* JOHN F. HOBART and others.

All the parties to an action for partition were the heirs at law of a former owner of the premises, who died intestate, and they took title to the lands in question by descent, as such heirs. The complaint alleged that each of the nine parties, plaintiffs and defendants, was seised in fee simple, and entitled to, one equal undivided ninth part of said premises. The judge before whom the action was tried without a jury, found as matter of fact, and held as a conclusion of law, that eight, out of the nine parties and heirs, had been advanced by the intestate, in sums differing in amount; to the ninth, no advance whatever had been made; and yet the judge held and decided, as a conclusion of law, and adjudged, that the parts and shares of said premises, "belonging to the plaintiffs and other parties to the action" were "correctly stated and set forth in the complaint;" and that the plaintiffs were "entitled to judgment for partition and division of said lands and premises between them, as demanded in said complaint;" which was that partition might be made according to the rights and interests of the several parties as before alleged. The judgment or decree followed the conclusion of law, and adjudged and decreed that "each of said plaintiffs and defendants is entitled to the equal undivided one ninth part of said lands and premises." No notice was taken of the advancements, in the decree, or in the conclusions of law, but each party was decreed and adjudged to be entitled the same as though no advancement had been made. *Held* that this was manifest error, and that the exceptions to the findings and conclusions of law, in this respect, were well taken.

That it was quite probable, in view of all the facts presented, that some of the parties had no share or interest, whatever, in the lands in question; and that it was certain that the shares of such as did inherit were altogether unequal in proportion, inasmuch as their advancements all differed in amount.

That the party who had not been advanced at all had inherited much the largest share, and possibly the whole, depending upon the value of the premises, as compared with each of the several advancements.

The statute (1 R. S. 754, §§ 23, 24,) provides that the value of all advancements made to children, by an intestate, shall be reckoned as part of the real and personal estate of the intestate; and if any advancement shall be equal or superior to the amount or share which the child so advanced would be entitled to receive of the real and personal estate of the deceased, then such child, and his descendants, shall be excluded from any share of the real and personal estate of the deceased. And in case the advancement is less than such share, then the child so advanced shall be entitled to receive so much, only, of the personal estate, and to inherit so much only of the real estate of the intestate, as shall be sufficient to make all the shares of

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the children in such real and personal estate, and advancements, to be equal, as near as can be estimated.

Where the rights and interests of the several parties, in a partition suit, have, by the judgment or decree, been adjudged and decreed to be altogether different from those to which they were entitled by law, it *seems* there is no way by which the error can be remedied, except by a reversal of the judgment, and the ordering of a new trial.

It is no answer to an objection that a decree in partition is erroneous in its adjudication as to the rights and interests of the several parties, in the premises, that inasmuch as the lands have been ordered to be sold and the proceeds of the sale, over and above costs and expenses, brought into court, the rights of all the parties may be adjusted properly in the distribution of the proceeds; because the proceeds can only be distributed according to the respective rights of the parties as adjudged and determined by the decree or judgment; and each party will necessarily have the same interest in the proceeds of the sale that he had in the land sold.

Where, in a partition suit, the defendants alleged in their answer that certain conveyances made to parties to the suit, by the former owner of the premises, by way of advancements, were void by reason of undue influence, and incompetency of the grantor; and the court, on the trial, refused to hear the evidence offered in support of such answer, as being irrelevant; *Held* that the error in the ruling, if any, was *waived* and abandoned when the defendants used those conveyances to establish their defense of advancements made to the several grantees, by such conveyances; and that they could not be heard to complain that they were not allowed to contest their validity.

Where a decree in partition required the referee to pay and discharge, out of the proceeds of the sale, all taxes, charges and assessments which might be a lien on the premises; instead of which, as appeared by his report of sale, he sold subject to such liens; *Held* that the order confirming the report was erroneous, and the same was reversed, and the sale set aside and vacated, as being contrary to the decree.

THIS is an action for partition. The complaint alleges that William L. Hobart, the father of the plaintiffs Chester L., Almira L., Caroline H. and the grandfather of the plaintiffs Byron F. and William L. Hobart, died in Potter, Yates county, on the 19th of July, 1865, intestate, seised of the lands mentioned in the complaint. That the said William L., at the time of his death, left the plaintiffs and the defendants, his children and grandchildren, his heirs at law. That Byron F. was son and only heir of Benjamin L., deceased, who died before his father. That the plaintiff Conley was an infant son of a deceased daughter

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of said William L. Hobart. That the plaintiffs and defendants, as heirs at law of said William L. Hobart, deceased, are each seised of and entitled to one equal undivided one ninth of said premises. That the lands described in the complaint were the only lands owned in common by said parties. The plaintiffs ask that the rights and interests of the parties may be ascertained, and partition and division made; or, in case partition cannot be made, that the premises be sold. The premises were alleged to be worth \$10,000. The defendants appeared and answered jointly. The answer admits that the plaintiffs and defendants are heirs of William L. Hobart, deceased. That said deceased died seised of the premises mentioned in the complaint. It denies that said William L., at the time of his death, was not seised of any other lands in the State of New York. The defendants deny that the plaintiffs are seised of the lands mentioned in the complaint, as tenants in common with the defendants, as mentioned in the complaint, or in any other way except as mentioned in said answer. The defendants, for a second answer to the complaint, allege that said William L., in his lifetime, conveyed certain lands and premises to his son Benjamin, the father of Byron F., and took back a receipt for \$3000, as an advancement to him. That the said William L., in his lifetime, conveyed to the plaintiff Chester L., three several pieces of land by way of advancement, in all amounting to the value of \$5800. That in 1850, said William L. conveyed to the defendant Charles H. a certain piece of land, \$1000 of the value of which was by way of advancement. The defendants, in their third answer, allege that said William L., in his lifetime, and until the several conveyances thereafter mentioned, was the owner in fee of the lands thereafter mentioned. That he was of the age of eighty-six years and upwards, in September, 1864. That in consequence of his advanced age and bodily infirmities he was of unsound mind. That

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said William L. resided in the family with said Chester L., who acted as his agent in transacting his business. That the plaintiffs, taking advantage of the infirmities of said William L., and by undue and improper influence exercised over him, obtained from him the several deeds mentioned in said answer. That although a pecuniary consideration was expressed in each of said deeds, yet no consideration was in fact paid. That each and every of the deeds mentioned in said third answer, were procured by undue and improper influence. That the said William L. was of unsound mind and wholly unfit, by reason of said unsoundness of mind, to transact any business. To which second and third answers of the defendants, the plaintiffs replied substantially as follows: The plaintiffs admit the conveyance to Benjamin, but deny they have any knowledge of the advancement. They admit the conveyance to Chester L., as alleged in the second answer. They deny all knowledge of the advancement to Charles H. In their reply to the third answer, the plaintiffs deny that at any time during his lifetime said William L. was unfit to manage his own affairs, or was of unsound mind, or that Chester L. had the control and management of the affairs of said William L. They deny that they took any advantage, in obtaining any of the deeds mentioned in the third answer. They allege that the land mentioned in the third answer as conveyed to Lucinda Decker, was conveyed to her at her request. They deny that any of the deeds were obtained by undue influence; that said William L. was of unsound mind; or that the deeds are fraudulent or void.

The issue joined was brought to trial at a special term, held in and for Yates county, on the 24th of May, 1869, before a justice of this court. Upon the trial it was admitted that said William L. Hobart died intestate, and that the persons named in the complaint were his heirs at

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law, and that he died seised of lands mentioned in the complaint. The plaintiffs then rested.

The counsel for the defendants moved that the complaint be dismissed for want of proof that the intestate did not die seised of any other lands in this State. The motion was denied, and the defendants excepted. The defendants then gave evidence tending to show that said intestate died seised of other lands. The counsel for the defendants objected to proving a conveyance by parol. The objection was overruled, to which the counsel for the defendants excepted. The counsel for the defendants offered to prove, upon the trial, all the allegations contained in the third answer. This was objected to on the part of the plaintiffs. The objection was sustained, and the evidence excluded. To which the defendants excepted.

The court found the facts as contained in the judgment, among which was the following: That William L. Hobart died intestate, on the 19th of July, 1865, leaving surviving him children and grandchildren, the parties to this action. That he died seised of the lands mentioned in the complaint, and was seised of no other lands. That prior to his death he made certain conveyances to the plaintiff Chester Hobart; on or about the month of February, 1851, one parcel, consideration \$1400; one other piece, on the 19th of January, 1860, containing eighty-six acres, consideration \$1; also, one other parcel, in South Bristol, Ontario county, consideration \$1; on the 26th of September, 1864, one other piece, consideration \$2000; on the 3d of November, 1864, one other parcel, consideration \$3500; on the 18th of February, 1865, one other parcel, consideration \$300. To his son Benjamin F., 15th of November, 1851, certain pieces of land, and took back a writing by which Benjamin acknowledged the receipt of \$2000, by way of deduction. That in 1864 William L. conveyed to the defendant Byron F. forty acres, for the consideration of \$2000.

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That on the 3d of December, 1864, he conveyed to Hannah A. H., twenty-three and a half acres, consideration \$700. On the 26th of September, he conveyed to Hannah A. H. seventy-five acres, consideration \$5250. In November, 1864, he conveyed to the defendant Lucinda, sixty acres, consideration \$2400. That on the 18th of November, 1850, he conveyed to the defendant Charles H., 135 acres, consideration \$1000; and on the 5th of November, 1864, he conveyed one other piece to said Charles H., consideration \$2600. That in November, 1864, he conveyed to the plaintiffs Almira L. and Caroline H., 240 acres, consideration \$10,000; and on the 30th of November, 1864, he conveyed to them thirty-three acres, consideration \$1320. That on 3d of December, 1864, he conveyed to the plaintiff Conley, fifty acres, consideration \$2000. That the grantees went into possession of the several pieces of land conveyed, and were still in possession, claiming the lands under the said conveyances.

The judge also found the following conclusions of law:

That the several conveyances set forth in said findings of facts were made by said William L., in his lifetime, by way of advancement to the respective grantees, as follows:

1. To Chester L. Hobart, the sum of . . . \$7,202
2. " Byron F. Hobart, " . . . 4,000
3. " Hannah A. H. Allington, the sum of . . . 5,950
4. " Lucinda Decker, the sum of . . . 2,400
5. " Charles H. Hobart, " . . . 3,600
6. " Almira L. Lane, " . . . 5,660
7. " Caroline H. Doubleday, the sum of . . . 5,660
8. " William L. Conley, " . . . 2,000

That the lands described in the complaint descended to the heirs at law of William L. Hobart, as therein stated. That the part or share belonging to the plaintiffs and other parties to this action, are correctly stated and set forth in the complaint. That the plaintiffs were entitled to judgment for partition, as demanded in the complaint. And

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it appearing that partition thereof could not be made, the land was directed to be sold under the direction of Theodore M. Brown, referee, and the proceeds of said sale, after deducting costs and charges, were directed to be brought into court, to abide its further order.

And the referee was directed to make a report of his doings; all other questions in the action to be reserved until the coming in of said report.

Upon filing said findings, a judgment was entered, on January 11, 1870, adjudging that the parties to this action were seised of and entitled to the lands and premises in the complaint thereafter described, with the appurtenances, as tenants in common. And that the respective rights and interests of the plaintiffs and defendants therein are stated in the complaint, and in the finding, that is to say, each of the plaintiffs and defendants are entitled to the equal undivided one ninth of said premises as children, and grandchildren, and heirs at law of said William L. Hobart, deceased, as stated in the complaint. The judgment then described certain lands, which were directed to be sold under the direction of the referee. The judgment contains directions to the referee, &c., reserving all other questions until the report made subsequent to the confirmation of the report of sale. The defendant duly excepted to the findings and conclusions of law.

The defendants made a case containing the evidence and exceptions taken upon the trial, and appealed to the general term from the said judgment, and from an order made at a special term confirming the referee's report of sale.

D. B. Prosser, for the appellants.

I. The court erred in sustaining the objections to the offer on the part of the defendants, to prove the allegations contained in the third answer of the defendants; because, 1st. The third answer contained a counter-claim falling directly within the first subdivision of section 150 of the

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Code, as a cause of action connected with the subject matter of the allegations set forth in the complaint. (*Mattoon v. Baker*, 24 *How. Pr.* 329.) The complaint alleges that the lands mentioned therein were the only lands owned in common by the said parties. This allegation was substantially denied in the answer of the defendants. If the facts alleged in the third answer were true, it follows that the plaintiffs and defendants were seised of the land mentioned and described in said third answer, in addition to those mentioned in the complaint. 2d. It cannot be successfully denied but that the allegation in the third answer constituted a valid cause of action against the plaintiffs, on the part of the defendants, to which the same rules of pleadings applicable to complaints should be applied, and the reply of the plaintiffs treated the same as an answer to a complaint. If so, then it follows as a matter of course that the plaintiffs having replied instead of demurring to the third answer, can only avail themselves of the objection that the answer does not state facts sufficient to constitute a cause of action. If there was any other objection to the third answer, the plaintiffs should have demurred to the same. By their omission to demur, they virtually admit that the subject matter contained in the third answer was a valid counter-claim, subject only to inquiry, whether it contained facts sufficient to constitute a cause of action. The plaintiffs, by taking issue upon the allegation contained in the answer, are estopped from insisting that it does not contain a valid counter-claim. The second subdivision of the 150th section of the Code provides that the defendant may set up as many counter-claims as he may have, whether equitable or legal, &c. The 153d section of the Code provides that the plaintiff may demur to any new matter or counter-claim, where upon its face it does not constitute a defense or counter-claim. It would seem to follow that if the third answer did not contain a valid counter-claim, the plaintiffs should

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have demurred. Failing to do so, and taking issue upon the allegations, such issue should have been tried as one of the issues in the action. (*Ayres v. O'Farrell et al.*, 10 *Bosw.* 143. *Smith v. Countryman*, 30 *N. Y.* 655.) 3d. It was competent for the defendants to show that the plaintiffs and defendants were seised as tenants in common of other lands than those mentioned in the complaint. Any evidence which tended to establish such fact was manifestly proper. The fact that the intestate was of unsound mind when he executed the deeds, or any one of them, would establish the fact that he died seised of the land mentioned in said deeds. The defendants were not bound to establish the fact that he died seised of other lands, in any particular way or manner. The fact, when established, constituted a defense to the action.

II. The court erred in overruling the objection on the part of the defendants, to the plaintiffs proving the conveyance by the intestate, by parol. No rule of law is better settled than that a conveyance of real estate cannot be proven by parol.

III. The court erred in sustaining the objection on the part of the plaintiffs to the question put to the witness Charles Hobart, as to whether there was anything said when the deed was given to him, that any part of the consideration was to be an advancement to the witness. This evidence was clearly competent, and the witness was competent to testify to the fact. The second answer alleged that \$1100 of the consideration was by way of advancement.

IV. The court erred in excluding the offer of the defendants to prove what the intestate said about the advancement to Benjamin, at the time of the conveyance to him. The declarations of the father in connection with the giving of the deed by him to Benjamin, were certainly competent for the purpose of proving that the consideration or some part thereof was by way of advancement to Benjamin. (*Hicks v. Gildersleeve*, 4 *Abb.* 1, 5.)

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V. The evidence offered on the part of the defendants to prove that William L., the father, at the time he executed the deed to the defendant Lucinda Decker, was of unsound mind, ought to have been received. The exceptions to the refusal of the court to receive said evidence were well taken. The defendants in their third answer allege that Lucinda Decker had no agency in procuring said deed, and they insist that the deed was void upon the ground that the grantor was of unsound mind at the time of the execution thereof. It was certainly competent for the defendant to prove that the deed to Mrs. Decker was void, and that she did not claim anything under the same, or show any other fact which would render said deed null. Unless the deed to Mrs. Decker was valid and passed the title to her, the intestate died seised thereof, thus showing that the plaintiffs were seised, as tenants in common, of other lands than those mentioned in the complaint.

VI. The conclusion of law by the court, that lands described in the complaint descended to the heirs at law of the said William Hobart, as therein stated, is wholly unwarranted by the facts found, and is in contradiction therewith; because the complaint alleges that the plaintiffs and defendants are each seised in fee, and entitled to the undivided one ninth part of the premises. This conclusion of law wholly ignores the fact of the advancements found by the court. The parties advanced were only seised as heirs at law, subject to the advancements made to them respectively; no notice whatever is taken of the advancements in the conclusion of law under consideration.

VII. The conclusion of law, that the part or share thereof belonging to the plaintiffs and other parties to the action are correctly stated in the complaint, and that the plaintiffs are entitled to judgment for partition of said lands and premises between the parties to the action, as demanded in the complaint, is erroneous, and in direct

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conflict with the facts found and conclusions of law—that the plaintiffs had been largely advanced. The complaint alleges that the plaintiffs are each entitled to one ninth of the premises. The conclusion of law is that they are each entitled to the one undivided ninth of the premises. This conclusion gives to the plaintiffs one undivided ninth of said premises mentioned in the complaint, irrespective of the advancement made to them, although some of the plaintiffs had been advanced in a sum greater than the value of the remaining premises.

VIII. So much and such part of the judgment as adjudges that the parties to the suit “are seised of and entitled to the lands and premises in the complaint mentioned, and thereafter described, as tenants in common in fee simple, and that the respective rights and interests of the respective parties are as stated in the complaint and finding; that is to say, each of the said plaintiffs and defendants is entitled to the one equal undivided one ninth part of said lands and premises, as children and grandchildren and heirs at law of the said William L. Hobart, deceased, as stated in the complaint, and is seised in fee as tenant in common,” is erroneous and wholly unsupported by the findings of facts and the evidence. The judgment gives the plaintiffs the one equal undivided ninth of the premises mentioned and described therein, irrespective of the large advances made to them by their father during his life, as found by the court. While the judgment remains in force, all the defendant John F. Hobart can claim under the judgment, is the one ninth of the proceeds of the sale, notwithstanding some of the plaintiffs have already been advanced a much greater sum than the value of said remaining premises.

Morris Brown, for the respondents.

I. The first exception taken on the trial, was to the refusal of the court to nonsuit the plaintiff “for want of

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proof that the intestate did not die seised of any other lands in this State" than those mentioned in the complaint, and erroneously assumes that such proof is necessary on the part of the plaintiffs to make out a case. It is nowhere so alleged in the complaint, and if it was, need not be proved. The affirmative of this proposition is with the defendants. If proved, it would not amount to a defense to the action, but only affect the question of costs. This view was adopted by the defense; for they thereupon proceeded to give evidence tending to show that the intestate died seised of other lands, and it became one of the litigated questions on the trial.

II. The third exception, relating to the exclusion of evidence to prove all the allegations of the third answer, was not well taken, because, 1st. The evidence offered was immaterial; it related to lands not embraced in the complaint, and of which the intestate did not in fact die actually seised or possessed, but to lands held adversely. The possession of the grantees was under claim of title, and whether with or without a valid deed, is adverse. (*Clapp v. Bromagham*, 9 Cowen, 530.) The rule that adverse titles are not to be tried in partition, is not changed by the Code. (*Stryker v. Lynch*, 11 N. Y. Leg. Obs. 116.) Section 16, 2 R. S. 320, authorizes two defenses to the action of partition, in addition to which the defendants may allege anything that will abate the action, or bar the plaintiffs' right to a judgment. The allegations of the third answer, proved, would not amount to a defense—would neither abate the action or bar a judgment. The prayer of that answer is, "that judgment be given, that the lands and premises mentioned in said third answer and in the complaint in this action, be partitioned and divided among the heirs at law of said Wm. L. Hobart." (*Supreme Court Rules*, 77.) If the exception should be regarded as well taken, the judgment of sale and all proceedings under it by the referee, should be

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allowed to stand. But the defendants have had the benefit of all these lands allowed to them by way of advancement, and all the parties, grantees, have been charged with their value in the judgment. No additional benefit could accrue to the defendants by setting aside the deeds. The defendants have substantially obtained all they asked for, and should be content.

III. The first exception is to the finding of a fact not denied in the answer. The second exception is to the finding of a fact admitted in the answer; and the third is to a conclusion of law necessarily founded thereon. The fourth, fifth and sixth exceptions are to different provisions of the judgment, all of which are abundantly sustained by the findings upon which the judgment was entered. The seventh exception is to that portion of the judgment ordering a sale of the premises. The judgment in this respect is sustained by the findings, which themselves are founded upon the evidence, and the consent of the plaintiffs' counsel. The defendants are estopped from this exception by this letter. It is to be presumed that the findings and order of sale are founded upon proper proofs or inquiry by the court. (*Warfield v. Crane*, 4 *Keyes*, 462.) If it is alleged that the judgment is erroneously entered, upon the findings, the remedy is not by appeal, but by motion to correct the judgment. (*Campbell v. Adams*, 38 *Barb.* 132.) Again; the court, upon appeal, may order a decree to be corrected, in conformity with the decision, without ordering a new trial. (*Same cases as above.*)

By the Court, JOHNSON, J. The parties to this action for the partition of land are the heirs at law of William L. Hobart, deceased, who died intestate; and they take title to the lands in question, by descent, as such heirs.

The complaint alleges that each of the nine parties, plaintiffs and defendants, is seised in fee simple of, and

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entitled to, one equal undivided ninth part of said premises. The judge, at special term, before whom this action was tried, without a jury, finds as matter of fact, and holds as a conclusion of law, that eight out of the nine parties and heirs, as aforesaid, had been advanced by the intestate, in various amounts, each of which differs materially from the others. And yet he holds and decides as a conclusion of law, and adjudges, "that the parts and shares" of said premises "belonging to the plaintiffs and other parties to the action, are correctly stated and set forth in the complaint;" and "that the plaintiffs are entitled to judgment for partition and division of said lands and premises between them, as demanded in said complaint." Which is, that partition may be made according to the rights and interests of the several parties, as before alleged. The judgment or decree follows the conclusion of law in this respect, and adjudges and decrees, that "each of said plaintiffs and defendants is entitled to the equal undivided one ninth part of the said lands and premises." No notice whatever is taken of these advancements, in the decree, or in the conclusions of law, adjudging the rights of the respective parties, but each is decreed, and adjudged, to be entitled the same as though no advancement had been made. This is manifest error; and the exceptions to the findings and conclusions of law in this regard are well taken. Each of the parties, as has been seen, had been advanced by the intestate, except one, who had not been advanced at all; and those who had been advanced had been advanced in unequal amounts. The statute (1 R. S. 754, § 23) provides that the value of all advancements, so made, shall be reckoned as part of the real and personal estate of the intestate; and if any advancement shall be equal or superior to the amount or share which the child so advanced would be entitled to receive of the real and personal estate of the deceased, then such child and his descendants shall be excluded

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from any share of the real and personal estate of the deceased. By section 24 of said statute, it is provided that in case the advancement is less than such share, then the child so advanced, shall be entitled to receive so much only of the personal estate, "and to inherit so much only of the real estate of the intestate as shall be sufficient to make all the shares of the children in such real and personal estate, and advancements, to be equal, as near as can be estimated." It is quite probable, in view of all the facts presented, that some of the parties to the action have no share or interest whatever in the lands in question; and it is quite certain that the shares of such as do inherit are altogether unequal in proportion, as their advancements all differ in amount. The party who has not been advanced at all, has inherited much the largest share, and possibly the whole. This depends upon the value of the premises, as compared with each of the several advancements. It is suggested in behalf the respondents, that inasmuch as the lands have been ordered to be sold, and the proceeds of the sale, over and above costs and expenses, brought into court, the rights of all the parties may be adjusted properly in the distribution of the proceeds. Not so. The proceeds can only be distributed according to the respective rights of the parties as adjudged and determined by the decree or judgment. Each party will necessarily have the same interest in the proceeds of the sale that he had in the land sold. The difficulty is, that the rights and interests of the several parties have been adjudged and decreed to be altogether different from those to which they are entitled by law; and I can see no way by which this error can be remedied, but by a reversal of the judgment and the ordering of a new trial.

The plaintiffs should have demurred to the third answer, instead of taking issue upon the facts and allegations therein contained, by replication. I incline to the opinion, however, that the court properly refused to hear the evi-

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dence offered by the defendant in support of that answer, as wholly irrelevant, and foreign to the matter pertaining to the right of action alleged in the complaint. But however this might be, the error, if any, of the ruling, was waived and abandoned when the defendants used those conveyances to establish their defense of advancements made to the several grantees, by them. In doing this they necessarily affirmed the validity of the conveyances, and cannot be heard to complain that they were not allowed to contest their validity.

We are also of the opinion that the order confirming the report of the sale, the appeal from which was heard in connection with the appeal from the judgment, should be reversed, and the sale set aside and vacated. It was clearly contrary to the decree. By the decree the referee was required to pay and discharge, out of the proceeds of the sale, all taxes, charges and assessments which might be a lien on the premises. Instead of this, he sold subject to such liens. The object of this provision, in all decrees of this kind, is to insure the purchaser a perfect title, and give assurance to bidders at the sale that all such claims are to be extinguished from the moneys paid by them upon their bids. The sale, as made, was calculated to alarm bidders, and to induce them to bid so as to leave an ample margin to meet the contingencies of the existence of such claims to an unknown and considerable amount. And it appears to have had that effect. As the judgment is reversed, of course no new sale can be ordered.

The judgment is therefore reversed, and a new trial ordered, with costs to abide the event; and the order confirming the report of sale is reversed, and the sale set aside and held for nought, with \$10 costs of appeal, to abide the event of the action.

[FOURTH DEPARTMENT, GENERAL TERM, at Oswego, October 8, 1870.
Mullin, P. J., and *Johnson* and *Talcott*, Justices.]

COOK vs. THE ERIE RAILWAY COMPANY.

Where a carrier of goods notifies the consignee of their arrival, and that they must be unloaded and taken away by a specified day, and then causes the goods to be unloaded before the time specified, and they receive injury in consequence of being thus unloaded, the carrier is liable, as such, for the damage resulting from the injury, whether guilty of negligence or not.

If the goods are not unloaded until after the expiration of the time fixed for unloading and taking them away, then the carrier is bound to exercise such care and prudence in unloading and caring for them afterwards, and before they are removed by the owner, as a person of ordinary prudence would take of his own property. And if the goods are injured in consequence of the carrier's neglect to exercise such care and prudence, the carrier is liable to respond in damages for the injury.

And although the goods are not taken by the consignee within the time fixed for their removal, and he either neglects or refuses to take them within such reasonable time, yet the carrier has no right to cast the goods away, or to throw them out, or leave them where they will be open and exposed to injury from the elements.

In such a case it is the duty of the carrier to take care of them for the owner.

And if he neglects this duty he will be held liable for the damages arising from a want of such care.

This care must be such, at least, as a prudent and careful man would take of his own property of like description.

A common carrier may discharge his liability entirely, by placing the goods in a warehouse at the place of destination, or by delivering them safely to some responsible third person who will undertake to keep them safely, and deliver them to the consignee when called for, in case the consignee cannot be found, or he refuses or neglects to take them away within a reasonable time after tender or notice.

After the arrival of goods carried by a railroad company, at their place of destination, and notice to the consignee, the latter commenced removing them, but residing at a distance of twenty miles from the depot, with only one team, he could not conveniently take more than one load per day. The goods were not put into a warehouse, or left with a third person for the owner, but were thrown out of the car, upon the ground, on the company's premises, and by the directions of their agent; and while in this situation, were wet and damaged by the rain, for want of shelter. In an action by the owner, to recover damages of the company, *it was held* that the question whether the defendant had taken proper care of the goods, and whether they had been injured by reason of their not having been properly cared for, was a question for the jury, and it was properly submitted to them.

The duty of a carrier is not fully discharged by transporting the goods and giving notice of their arrival, to the consignee; but continues until he

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has taken care of the goods, by placing them in a safe place, or in safe hands, for the consignee.

A carrier of goods is bound either to deliver them to the consignee personally, or to give him notice of the arrival thereof.

THIS action was brought to recover of the defendant, as a common carrier, damages for so "carelessly unloading" a lot of hides at the defendant's Savona station that they were spoiled. On the trial it appeared that the defendant as a common carrier undertook, in November, 1868, to transport a lot of hides for the plaintiff, from New York to Savona; that the hides arrived in the defendant's car, at that station, on Monday the 9th day of November. It appeared also that hides had been previously transported by the defendant to that station for the plaintiff, but never stored. On this occasion there was no room in the defendant's storehouse for them. On the Monday of their arrival the plaintiff's agent was notified of their arrival; and that the car containing them would be wanted on the following Thursday; a printed notice from the defendant, containing amongst other things, notice that the defendant reserved the right to unload after the expiration of twenty-four hours, in the most convenient place for the company, charging the consignee for the same, and that the company would not be responsible for damage resulting therefrom, was at the same time handed to the plaintiff's agent. The plaintiff, by the same agent, on that day (Monday) or on the following day (Tuesday) paid \$60.62, being the freight upon the hides, at which time the car door was unlocked and a load taken by him. The hides which the plaintiff omitted to remove from the car were unloaded upon the ground near the depot. There was a conflict in the evidence as to whether the hides were unloaded on or before Thursday, the time at which the plaintiff was notified the car would be wanted. The plaintiff's witness testified that on Wednesday they were strown upon the ground, while on the other

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hand the defendant's witnesses testified that they were not unloaded until Thursday afternoon, and were carefully piled on the ground. They were, nevertheless, after being unloaded, wet and damaged for want of shelter. Upon this state of facts the defendant's counsel asked the judge to charge the jury: That after notice of the arrival of the hides, and reasonable time for their removal, the defendant was not required to unload them in a place protected from the storm unless it had such a place prepared. The court did not so charge, but on the contrary, charged, that although the defendant's relation to these hides, as a common carrier, had ceased, they were "liable to the plaintiff for any damages which resulted to the plaintiff for a lack on the part of the defendant, of ordinary care and prudence in the custody and treatment of the property;" and that if the hides were not unloaded until after the time when, by the notice given to the plaintiff, he was permitted to leave them in the car, then the question would be, whether in such unloading, the defendant exercised ordinary care and prudence in the care and treatment of the property, such as an ordinarily careful man would take of his own property;" and further on in his charge, he stated that there were platforms about the buildings upon which hides might have been piled, with more or less inconvenience to the defendant's business; that there was lumber about there from which a platform might have been made, and the hides covered, and that it was for the jury to say, under all the circumstances, whether the defendant used the ordinary care and prudence he was bound to use; that if they were unloaded, after the time fixed, and disposed of without ordinary care and prudence, the defendant was liable.

The defendant's counsel requested the court to charge the jury, in substance, that the law did not require the unloading to be in a place protected from the storm, unless the defendant had such a place prepared and not occu-

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pied by other freights; but that the only want of care for which the defendant was responsible, was carelessness in the manner of unloading. The court refused so to charge, and the defendant's counsel excepted.

The defendant's counsel further requested the court to charge the jury, that there was no duty upon railway carriers to store goods, after the consignee had notice of their arrival, and a reasonable time to remove them. The court declined so to charge, and the counsel for the defendant excepted; and he also excepted to the refusal of the judge to charge each of the following propositions, viz: That there was no duty upon the defendant to store hides after the plaintiff had notice of their arrival, and reasonable time to remove them; and, that after notice of the arrival of the hides, and a reasonable time for their removal, the defendant was not required to unload them in a place protected from the storm, unless it had such place prepared.

The defendant also excepted to that portion of the charge of the judge, in which he instructed the jury, that if the hides were not unloaded until after the time when, by the notice given to the plaintiff, he was permitted to leave them, that the question would then be, whether in such unloading, which the defendant had the right to do after the expiration of the time, the defendant exercised ordinary care and prudence in the care and treatment of the property, and that ordinary care and prudence was such care and prudence as an ordinarily careful man would take of his own property.

The jury rendered a verdict in favor of the plaintiff, for \$800. Thereupon the defendant, at the same circuit, made a motion, which was entertained by the judge who tried the cause, for a new trial, as well upon the exceptions taken, as for excessive damages. This motion was denied, and the case and exceptions ordered to be heard at the general term, in the first instance.

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D. Rumsey, for the plaintiff.

I. The several objections taken by the defendant to the evidence were properly overruled. The evidence was relevant to show that there was no negligence on the part of the plaintiff, and as bearing directly upon the question of damages. Handmore swore that he could have drawn a hundred hides had they been dry, and only half that number after they were wet. This increase in the cost of transporting the hides was clearly an item of damage, and the evidence offered was competent as showing the measure of damages in that respect. (*Briggs v. N. Y. Central R. R. Co.*, 28 Barb. 515.) The increase in the cost of transportation of the hides to Tyrone, by reason of their being wet, was a direct and necessary result of their wetting. (2 Greenl. Ev. § 268, a. *Sedgwick on Measure of Damages*, 359.) But though this evidence may not have been properly admitted, it could do the defendant no harm, and is not cause for granting a new trial. (*Benjamin v. Smith*, 12 Wend. 404. *Brown v. Hoburger*, 52 Barb. 15. *Rundle v. Allison*, 34 N. Y. 180. *Patterson v. O'Hara*, 2 E. D. Smith, 58.)

II. The exception to the charge that the defendant was bound to exercise ordinary care and prudence after its liabilities as common carrier had determined, was not well taken. (*Thomas v. Boston and Providence R. R. Co.*, 10 Metc. 472. *Goold v. Chapin*, 10 Barb. 612, 616. *S. C.* 20 N. Y. 259. *Story on Bailments*, § 448.) These authorities all hold that the carrier, after his liability as carrier has ceased, becomes liable as warehouseman. But warehousemen are liable for ordinary neglect, and they are bound to ordinary care, skill and diligence. (*Story on Bailments*, § 444. *Powers v. Mitchell*, 3 Hill, 545. *Platt v. Hubbard*, 7 Cowen, 497. 2 Kent's Com. 591.)

III. The request to charge that the cases referred to by the plaintiff's counsel did not require the unloading to be in a place protected from storm, unless the defendant had a place

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prepared, &c., was properly refused. There is nothing in the case upon which this request could be based. (*City of N. Y. v. Price*, 5 *Sandf.* 542. *Benson v. Berry*, 55 *Barb.* 620.)

IV. The request to charge that the defendant was not bound to deliver to the consignee personally, or to give notice of the arrival of the goods, was properly refused. If a charge of the court contains two propositions, and is excepted to generally, if one of the propositions is true, the verdict will not be set aside for error in the other proposition. (*Hart v. R. and S. R. R. Co.*, 4 *Seld.* 37. *Jones v. Osgood*, 2 *id.* 233. *Haggart v. Morgan*, 1 *id.* 422. *Caldwell v. Murphy*, 1 *Kern.* 416.) But the carrier is bound either to deliver the goods to the consignee personally, or to give notice to the owner or consignee of the arrival of the goods. (*Gibson v. Culver*, 17 *Wend.* 305. *Miller v. S. N. Co.*, 10 *N. Y.* 431, 439. *Price v. Powell*, 3 *id.* 323, 326. *McDonald v. W. R. R. Corp.*, 34 *N. Y.* 497, 501. *Northrop v. Syracuse, &c. R. R. Co.*, 5 *Abb. Pr. N. S.* 425, 432. 2 *Kent's Com.* 605.) But the case shows that the consignee had notice, and a time limited for him to take the goods away. Therefore the refusal to charge could have done the defendant no harm, although the request had been correct; and it was proved that the plaintiff had an agent at the depot on the day the hides arrived, to inquire for them, and who received notice. A judgment will not be reversed for a technical error, which the court can see did or could do the party complaining of it no injustice. (*Court of App. June 30, 1870.* 2 *Alb. Law Jour.* 69.)

V. The court was correct in refusing to charge that the liability of the defendant as warehousemen continued for only a reasonable time. Such liability continues until the carrier is legally discharged. (*Goold v. Chapin*, 20 *N. Y.* 259.) "Suppose the consignees had been dead or absent, or had refused to receive the goods in store, what would have been the carrier's duty? Certainly he would have no right to leave them on the wharf or in the street with-

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out protection. He would not be justified in abandoning the goods." (*Ostrander v. Brown*, 15 John. 39, 43.) The carrier may certainly terminate his liability as carrier by placing the goods in store with a third person for the owner. (*Fisk v. Newton*, 1 Denio, 45.) But if they deposit the goods in their own warehouse, their liability as warehousemen commences after the consignee has a reasonable time to take the goods away, and continues until discharged by law. (*Goold v. Chapin*, 10 Barb. 612, 617. *Northrop v. Syracuse, &c. R. R. Co.*, 5 Abb. N. S. 425. *Thomas v. Boston, &c. R. R. Corp.* 10 Metc. 472, 477. *Norway Plains Co. v. Boston and Maine R. R. Co.*, 1 Gray, 263.) In this last case the court say: "It is the duty of the company to store them and preserve them safely, ready to be delivered, and actually deliver them when duly called for by parties authorized to receive them; and for the performance of these duties after the goods are delivered from the cars, the company are liable as warehousemen or keepers of goods for hire." And this seems to be received as law, as far as quoted in *McDonald v. W. R. Corp.*, (34 N. Y. 503,) and in *Northrup v. Syracuse, &c., R. R. Co.*, (*supra.*)

VI. The refusal of the court to charge that there was no duty upon railway carriers to store goods after their consignee had notice of their arrival and a reasonable time to remove them, was correct. (*Ostrander v. Brown*, 15 John. 39. *Angell on Carriers*, § 75. 2 Kent's Com. 605. *Goold v. Chapin*, *supra.* *Kimball v. W. R. Corp.*, 6 Gray, 542. *Powell v. Myers*, 26 Wend. 591.)

VII. The exception to the refusal of the court to charge that if the hides were not unloaded until Thursday afternoon, as stated by the defendant's witnesses, the plaintiff could not recover, was not well taken. 1. The defendant's liability as a common carrier continued for a reasonable time. (*Price v. Powell*, 3 N. Y. 322. *McDonald v. W. R. Corp.*, 34 N. Y. 497, 501.) The defendant had set Thursday as a reasonable time to take the hides away, and was

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liable as carrier until the expiration of that time. 2. Admitting that the defendant had gained the right to unload the hides on Thursday, yet if it was negligently done, so that they were injured by it, the request was properly refused. The defendants were liable for ordinary neglect, though their extraordinary liability had ceased, and the court so charged. (*Goold v. Chapin*, 10 Barb. 612. *Platt v. Hibbard*, 7 Cowen, 497.) The evidence shows that the hides were peculiarly susceptible to injury by wet, and that they were not stacked or covered up. For this reason, that the proposition was not right in every aspect, the refusal so to charge was correct. (*Doughty v. Hope*, 3 Denio, 594. 1 N. Y. 79.)

VIII. The exception to the refusal to charge that there was no duty upon the defendant to store the hides after the plaintiff had notice of their arrival, and reasonable time to remove them, was not well taken. (*See authorities cited under 6th point.*)

IX. The exception taken to the refusal to charge that after notice of the arrival of the hides, and reasonable time for their removal, the defendant was not required to unload them in a place protected from storm, unless it had such place prepared, was not well taken. (*Goold v. Chapin*, *supra*. *Powers v. Mitchell*, 3 Hill, 545.) The proprietors of a railroad are liable for want of ordinary care in their servants, in unloading freight from their cars, and if damage occurs through want of such care, they are responsible therefor. (*Kimball v. W. R. R. Co.*, 6 Gray, 542.) It will not be denied that there was negligence in unloading these hides in an exposed place. It was not such care as an ordinarily careful man would take of his own property.

X. The last exception was not well taken. It has been shown that the defendant, after its extraordinary liability had ceased, was liable as warehouseman, and that in that capacity it was held to ordinary care and prudence; and ordinary care and prudence was properly defined as such

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"as an ordinarily careful man would take of his own property." (*Shear. & Red. on Neg.* 18, § 20. *Express Co. v. Kountze Brothers*, 8 Wall. U. S. 342.)

XI. There can be no doubt of the defendant's negligence in the management of these hides. They were thrown out on the ground, and not stacked up so as to keep them dry, and Moore swears that he might have had it done without trouble, but he didn't think of it. It had rained the night they were thrown out. 1. The plaintiff was not guilty of negligence. The evidence shows that the weather was very bad, and that the hides were as well cared for as could be done with the means at the plaintiff's command; that they were sorted, and the wettest put into the vats; and that the plaintiff tried to preserve them, all he could. The court will not interfere with the verdict of a jury unless there is such a preponderance of evidence against it, as to induce them to think that the verdict originated either in passion, prejudice or mistake. (*Murphy v. Boker*, 3 Rob. 1. *Dart v. Farmers' Bank*, 27 Barb. 337.)

XII. The damages were not excessive. The loss as sworn to by the plaintiff was \$845, and none of this loss was chargeable upon him.

G. M. Diven, for the defendant.

I. The court erred in submitting to the jury the question whether in unloading the hides after the expiration of the time the plaintiff was permitted to leave them in the car, the defendant exercised that ordinary care and prudence in the care and treatment of them, which an ordinarily careful man would take of his own property; as well as in its refusal to charge that the defendant, after the time for their removal, was not required to unload them in a place protected from the storm, unless it had one provided. 1. Railway warehouses are for the convenience of the company in receiving, weighing, billing, loading and unloading goods. (*Redf. on Carriers*, § 110.)

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The refusal to charge, and the charge taken as a whole, amounts to this, that if the defendant had no depot or shed in or under which the hides could be unloaded secure from the storm, they were bound to make one. No case has gone so far. The case of *Kimball v. The Western Railroad Company*, (6 Gray, 542,) does not go that length. That was a case of shipment of lumber; the carelessness complained of was in unloading freight, and thus probably splitting, or in some way damaging it in the act of unloading. The case of *Ostrander v. Brown*, (15 John. 39,) was decided on the ground that delivery had not been completed. In *Moses v. Bost. and Maine R. R. Co.*, (32 N. H. 523,) the goods were not ready for delivery. In *Norway Plains Co. v. B. and M. R. R. Co.*, (1 Gray, 263,) and *Thomas v. Boston and Providence R. R. Co.*, (10 Metc. 472,) the defendants had warehouses. In *Smith v. Nashua and Lowell R. R. Co.*, (7 Foster, 86,) the defendant was held liable, not because bound to store, but because it did store. 2. There was no duty on the defendant to store the hides after the time given the plaintiff to remove them. (*Redf. on Carriers*, §§ 110, 111; note 15, § 120. 2 *Redf. on Railways*, 57, 3d ed. *Smith v. N. and L. Railway Co.*, 7 Foster, 86, 92-96. *Lewis v. Western R. R. Co.*, 11 Metc. 509. *N. A. and S. R. R. Co. v. Campbell*, 12 Ind. 55-60. *Shepherd v. Bristol and Exeter Railway Co.*, *Law. Rep.* 3 Exch. 189. *Labar v. Taber*, 35 Barb. 305.)

II. The plaintiff was fully apprised by notice to his agent that the hides would be unloaded in the most convenient place for the company, within twenty-four hours. Extending the time until Thursday did not waive the effect of the notice, but left it operative as notice that the hides would be thus unloaded on that day, and that the company would not be responsible for damage resulting therefrom. And for this, if no other reason, the court erred in refusing to charge that the defendant was not required to un-

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load them in a place protected from the storm, unless it had such place prepared.

By the Court, JOHNSON, J. The only questions made by the points of the defendant's counsel are those arising upon exceptions to the charge, and to the refusals to charge as requested. The court charged the jury, 1st. That if the defendant caused the goods to be unloaded before the time it had fixed for having them unloaded and taken away, and they received injury in consequence of being thus unloaded, the defendant was liable as a common carrier for the damage resulting from the injury, whether it had been guilty of negligence or not. And, 2d. That if the goods were not unloaded until after the expiration of the time fixed for unloading and taking them away, then the defendant was bound to exercise such care and prudence in unloading and caring for them afterwards, and before they were removed by the owner, as a person of ordinary prudence would take of his own property; and if the goods were injured in consequence of the defendant's neglect to exercise such care and prudence, it would be liable to respond in damages for such injury. No exception was taken to the first proposition of the charge; but to the second proposition exception was taken, and the questions involved were presented in various forms, by requests, and exceptions to refusals to charge as requested. The jury rendered a verdict for the plaintiff, and of course found the facts embraced in one or the other of the propositions to be true.

The question therefore arises, whether the second proposition was erroneous in point of law. I think both were entirely sound. But assuming that the goods were not taken by the owner and consignee, within the time fixed for their removal, and that he either neglected or refused to take them within such reasonable time, what then became the duty of the defendant as a common

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carrier? Clearly it had no right, in such a case, to cast the goods away, or to throw them out, and leave them where they would be open and exposed to injury from the elements. All the text books and authorities will be found to agree, that in such a case it is the duty of the carrier to take care of them for the owner. And if he neglects this duty of taking care of the goods, he will be held liable for the damages arising from a want of such care. (*Story on Bailments*, § 545. *Fisk v. Newton*, 1 *Denio*, 45. *Ostrander v. Brown*, 15 *John*. 43. *Goold v. Chapin*, 20 *N. Y.* 259. *S. C.* 10 *Barb.* 612.) This care must, unquestionably, be such at least as a prudent and careful man would take of his own property, of like description. A common carrier may discharge his liability entirely, by placing the goods in a warehouse at the place of destination, or by delivering them safely to some responsible third person, who will undertake to keep them safely, and deliver them to the consignee when called for, in case the consignee cannot be found, or he refuses or neglects to take them away within a reasonable time after tender or notice. The goods, confessedly, were not put into a warehouse, or left with a third person for the owner, but were thrown out of the car upon the ground, on the defendant's premises, and by the directions of its agent.

The plaintiff, who resided and had his place of business 20 miles from the defendant's depot, was then engaged in removing the goods with his own team, and could not, as it appears, conveniently take more than one load per day. In this aspect of the case, the question arose whether the defendant had taken proper care of the goods for the plaintiff, and whether they had been injured by reason of their not having been properly cared for. This was a question for the jury, and it was properly submitted to them. The verdict must be held to be correct, on whichever of the two grounds the jury placed it.

The request by the defendant's counsel, to the court, to

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charge that after the arrival of goods and notice to the consignee, and the lapse of a sufficient time to remove them, the carrier was not bound to store them, or unload them in a place protected from the storm, unless it had such place prepared, was properly refused. The very point was decided the other way in *Ostrander v. Brown*, (*supra*.) It is well settled that the duty of the carrier is not fully discharged in such a case, until he has taken care of the goods by placing them in a safe place, or in safe hands, for the consignee.

The court also properly refused to charge that the defendant was not bound to deliver goods to the consignee personally, or to give notice of the arrival thereof. The carrier must do one or the other of these things. The proposition embraced in the request was, that he was not bound to do either, but might be discharged from all liability without doing either. But the question did not arise in the case, as notice was given, and the consignee was engaged in taking the goods, when the defendant caused them to be unloaded. It was, therefore, a mere abstract proposition having no bearing upon the facts of the case; and if it had been sound, the refusal to charge was no error for which an exception will lie.

The request to charge that if the hides were not unloaded until Thursday afternoon the plaintiff could not recover, was also properly refused. The court had laid down, in the charge, the true rule of law on that subject. The court had charged the jury that if such was the case, then the question arose as to whether the defendant had taken proper care of the property.

The verdict as to damages seems to be fully warranted by the evidence. A new trial must, therefore, be denied, and judgment ordered on the verdict.

[FOURTH DEPARTMENT, GENERAL TERM, at Syracuse, November 14, 1870.
Mullin, P. J., and *Johnson* and *Talcott*, Justices.]

**PETER LAPPIN, administrator &c., vs. THE CHARTER OAK
FIRE AND MARINE INSURANCE COMPANY.**

Where a policy of insurance against loss by fire runs to the "assured, his executors, administrators and assigns," an action is properly brought, after the death of the assured, in the name of his administrator, if a right of action has accrued to any one by reason of the destruction of the property insured. The administrator, in such a case, prosecutes for the benefit of the person or persons entitled to the moneys recovered on account of such loss; provided the contract remains in force; notwithstanding the change of title to the property insured.

A contract of insurance provided that the policy should not be assignable, before or after loss, without the consent of the company, manifested in writing thereon; that "in case of assignment without such consent, whether of the whole policy, or of any interest in it, the liability of the company shall then cease;" that "in case of any sale, transfer or change of title in the property insured, * * * or of any interest therein, such insurance shall be void and cease;" and that "in case of the entry for foreclosure of a mortgage, or the levy of an execution or attachment, or possession by another of the subject insured, without the consent of this company, indorsed hereon, this instrument shall immediately cease." The policy was for one year from December 7, 1867, and was renewed for one year from the latter date. On the 21st day of July, 1869, and during the life of the policy, the assured died intestate, and the property insured descended to his heirs at law. On the 9th of November, 1869, a total loss of the property by fire occurred. No consent had been indorsed upon the policy, by the company, at the time of the fire, and there had been long before, not only possession by others than the assured, of the subject insured, but a complete change of title, also.

Held that the policy, by the clear and explicit terms and provisions thereof, became void, and ceased to have any binding force, upon the death of the assured, and the vesting of the title to the property insured in his heirs at law. That this was a change of title, from the assured to others, which brought the case within the express terms of the policy.

Held, also, that the possession of the property insured, by others than the insured, without the consent of the company indorsed upon the policy, also produced the same result. It put an end to the contract, and rendered it no longer obligatory.

The cases of *Wyman v. Wyman*, (26 N. Y. 258;) *Smith v. The Saratoga Mu. Fire Ins. Co.*, (1 Hill, 497;) *Phelps v. The Gebhard Fire Ins. Co.*, (9 Bosw. 404;) and *Burbank v. The Rockingham Mu. Fire Ins. Co.*, (24 N. H. 550,) commented upon, and distinguished from the present.

Where the description of the property insured is made a part of the contract, and a warranty by the assured, and it is expressly provided, among other things, that in case of any misrepresentation or concealment, or omission to make known any fact which increases the hazard, the insurance shall be

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void; and the property is described and insured as a *dwelling-house*, when in fact it is used in part as a *saloon*, which increases the risk; it *seems* the policy is void, and of no effect, by reason of this misrepresentation.

APPEAL from a judgment entered upon the report of a referee. The action was brought by the plaintiff, as administrator of Isaac Shephard, deceased, upon a policy of insurance against fire, issued by the defendant to the intestate, in his lifetime.

The referee found and reported the following facts:

1st. That Isaac Shephard, in his life, was the owner in fee and in possession of lot No. 31 in block No. 11, West Oswego, upon which the buildings hereinafter mentioned were situated. 2d. The defendant, on the 7th day of December, 1867, issued its policy of insurance to the said Isaac Shephard, who was then living, as follows: \$400 on his framed dwelling-house, situate on block No. 11. \$100 on his household furniture, beds, bedding and wearing apparel of his own and his family. \$100 on his framed barn, situated in said block. That said policy by its terms was to expire December 7, 1868. That the same was regularly renewed for one year from said 7th of December, 1868, and a renewal certificate issued by the defendant to the said Shephard in his lifetime. 3d. The assured, Isaac Shephard, died at Oswego on the 21st day of July, 1869, intestate, and letters of administration were regularly issued to the plaintiff by the surrogate of the county of Oswego, on the 10th day of January, 1870. 4th. A fire occurred on the 9th day of November, 1869, by which the barn and house covered by the said policy were destroyed, together with such articles then in the house undisposed of, as were in the report particularly specified. That the fire originated in the west part of the barn. 5th. That at the time of the fire the barn was occupied for stabling horses and storing their feed, and the house, the first floor as a saloon, and the second floor as a dwelling, and was occupied by a family. 6th. That the house had in fact been occupied

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for many years before the fire, and up to the time of the fire, as a tavern or saloon. And at the time of the issuing of the policy in question, the rate of premium was reduced from what it had formerly been, because it was alleged and stated at the time, by the assured, that the dwelling was not to be used as a saloon or tavern. That saloons are generally deemed more hazardous than dwellings, and larger premiums charged. That the defendant or its agent did not know of the dwelling being occupied as a saloon after the issuing of the policy. That the occupation of a portion of the dwelling as a saloon did not in fact have anything to do with the origin of the fire. 7th. The plaintiff, as guardian of the children of the said Isaac Shephard, made out, as such guardian, proofs of loss under said policy, and served them on the agent of the defendant on the 14th or 15th of November, 1869. The defendant, as to those proofs, insisted that by the policy the heirs of deceased persons are not insured, but only the "executors, administrators and assigns," and desired proof of loss as administrator. That on the 21st day of January, 1870, the plaintiff, as administrator, served proof of loss on the agent of the defendant, and an account of the fire. 8th. The house insured was worth, at the time of the fire, \$600; the barn \$250. There was in the house at the time of the fire, covered by the policy, personal property of the value of \$48.56. 9th. That Isaac Shephard left Mary Shephard and two other children him surviving, and who were living at the time of the fire.

The referee's conclusions of law were:

1. That the death of the assured did not work such a change or transfer of title to the property as avoided the policy, or rendered it inoperative. That the property still remained insured, and covered by the policy, notwithstanding the death of Isaac Shephard.
2. That the administrator of the assured is the proper party to bring the action, and not the heirs of the deceased. The rea-

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soning of the court in the case of *Wyman v. Wyman*, (26 N. Y. 253,) and the opinion therein expressed, was controlling upon the referee, and decisive of the foregoing points, and the main questions in controversy in this action. 3. That the occupation of the dwelling, or portion of it, as a saloon, did not avoid the policy, it appearing that the fire was not in any way influenced by such fact. He therefore held and decided that the plaintiff, as administrator, &c., was entitled to recover in this action the sum of \$548.56, with interest from March 21st, 1870, \$10.38. And judgment was ordered in favor of the plaintiff, as administrator, against the defendant, for the sum of five hundred and fifty-eight dollars and ninety-four cents, with costs of this action.

From the judgment entered accordingly, the defendant appealed.

J. A. Hathaway, for the appellant.

I. The buildings which were burned were real estate, and as such vested in the heirs, immediately upon the death of the intestate, and such title remained in the heirs, about four months before the fire occurred. The plaintiff has no interest in the claim, and cannot recover; its subsequent injury by fire could not convert it into personal estate. The original policy was granted December 7, 1867, and renewed December 7, 1868, for one year, for \$600—\$400 on his frame dwelling-house, \$100 on furniture and wearing apparel, \$100 on his frame barn. Shephard died intestate on the 21st day of July, 1869, and left three infant children who are still living. The property was destroyed on the 9th of November, 1869. The plaintiff was appointed administrator, on the 10th day of January, 1870. There is no pretense, nor is it alleged, that Isaac Shephard was indebted at the time of his death, or that the heirs are irresponsible. The damages or value of the buildings claimed in this case has never been converted

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from realty to personal. It is true, when equity impresses a different quality upon property from that which it has in fact, such impression ceases whenever the possession of the estate and the right to it in each quality meet in the same person ; that is, when there is no other person than the one who has the actual possession, who has an equitable interest in retaining the fictitious character of the estate. Thus when real uses have been impressed upon personal property and the personal fund, and the uses, come together in the same person, the uses are considered as discharged and merged ; for there is no person to call for their application. So when by virtue of a contract of sale there has been an equitable conversion of personal into real estate, and the property comes into the possession of a person who is entitled to it, both as heir and executor, it immediately becomes in equity what it is in fact, that is, personal property. If the impression of realty which was given to the property in question had been given by the application of equitable principles, as would have been the case if there had been no statute on the subject, then as soon as the property was received by the person who alone was interested in it, after he became of full age and was competent to receive it, it would be considered both at law and in equity what it was in fact, that is, personal property or estate. Then the guardian could no longer affect the rights of those who might be interested in the estate, and no person whatever would have any right, which the law would acknowledge, to insist that one quality should be impressed on the estate rather than another. But when property is in the hands of a third person, its character cannot be changed without some act on the part of the person beneficially interested, indicating an intention to that effect. But on the contrary, when the property is "at home," as it is expressed, that is, when the fund and the uses are united in the same person, no election is necessary. (*Forman v. Marsh*, 11 N. Y. 544.) In 1815, New York passed a law that in case of

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sale by guardian of the real estate of an infant the proceeds should be considered, relative to the statutes of descents and distributions, and for every other purpose, as if the real estate had not been sold. The Revised Statutes (2 R. S. 195, § 180) provide as to such proceeds, that they shall be deemed real estate of the same nature as the property sold. These statutes are mere enactments of the chancery rule, and the object was to deprive the guardian of the power to do an act which would affect the rights of the representatives of the infants.

Shumway v. Cooper, (16 Barb. 556,) was an action to recover from an administrator certain bonds and mortgages and the proceeds which he, as administrator, had converted of the infants who never had had possession of them, and by no act had converted them into personalty, and in this case they descended, as the real estate would have done, to the heirs at law, and did not go to the personal representatives for distribution among the next of kin. Its direction must be controlled by the statutes of descents, and not by the statutes of distributions. The administrator is not entitled to collect or hold moneys collected upon bond and mortgage for purchase money of real estate, or to collect any moneys becoming due thereon. He is only entitled to that property which is assets for the payment of debts, and which, after the payment of debts and legacies, is to be distributed to the next of kin. Property that descends to heirs does not and cannot go to the executor or administrator, and if he gets possession of it the heir has his action at law to recover it. (*Foreman v. Foreman*, 7 Barb. 217.) Courts of equity, for the purpose of protecting the rights of parties who, as heirs or distributees, would otherwise be entitled to the fund, are careful not to permit guardians to change real estate into personal, or personal into real. And with that view it is the constant practice of the courts to hold lands purchased by the guardians with the infants' personal estate, or the rents and

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profits of the real estate, to be personalty, and distributable as such; and on the other hand to treat real property, turned into money, as still for such purpose real estate. (*Foreman v. Foreman*, 7 Barb. 217.) Lord Eldon says, in 19 Vesey, 123: "In the case of an infant, it is settled that as a trustee out of court cannot change the nature of the property, so the court of chancery, which is only a trustee, must act as the trustee out of court." (*Russell v. Russell*, 36 N. Y. 581. *Cruger v. McLaurey*, 2 Hand, 219.) In 10 Paige, 163, the administrator claimed the millstones, bolts and other machinery in the flouring mill as personal estate; held to be real and descended to the heirs. In *McNabb v. Pond*, (4 Bradf. 7,) the administrator claimed the interest in a pew in church; held that he had no right to it; that it went to the heirs. In 2 Selden, 597, the administrator claimed to recover the growing grass and fruit not gathered at the death of the intestate; held he had no claim upon them, but they all descended to the heir. In 10 Barb. 432, the administrator claimed to hold the proceeds of a land contract as personal assets, in his hands. The court say "the contract was made before his death, and was an actual interest vested in Thomas at the time of his death, and in his heirs afterwards." (This was a contract for the purchase of ninety acres of land.) The court held that the administrator had no claim or right to it. (2 R. S., Stat. at Large, p. 84, § 6, subd. 8.) The statute defines what are assets. By section 7, things annexed to the freehold shall not go to the executor, but shall descend with the freehold to the heir. By section 8, the right of the heir shall not be impaired by the general terms of section 6, (being the section defining what are assets.)

II. The recovery in this case by the administrator will not be a bar to a recovery hereafter in favor of the heirs. (*Russell v. Russell*, 36 N. Y. 581. *Roome v. Phelps*, 27 id. 357. *Smith v. Bowen*, 35 id. 83.) Can the plaintiff execute

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a conveyance that will carry the interest of the heirs to the lot on which the house stood? If not, his recovery or receipt for the damages claimed in this case will be no protection to these defendants against the heirs.

III. The referee erred in refusing to dismiss the complaint on motion, and to nonsuit the plaintiff upon the motion made by the defendant, at the close of the plaintiff's evidence. Because the proof and allegations of the complaint fail to establish facts sufficient to constitute a cause of action: This contract of insurance was made with Isaac Shephard, and the plaintiff has no interest in the policy, and the plaintiff was never known or recognized by the company, at any time, or in any manner.

1. Nor can the phrase "executors, administrators and assigns" in the policy, aid the plaintiff in this case, for this clause is subject to and qualified by the other provisions of the policy. We made the contract with one competent to contract, and the minds of the parties met, and in and by that contract it was agreed that "in case of any sale, transfer, or change of title in the property insured by this company, or of any interest therein, without the consent of the company, such insurance shall be null and void and cease." Now it appears, by the complaint and by the proof, that Shephard died, and that his three infant children were his only heirs, and that the title to all this property instantly changed, and vested in the three children July 21, 1869, some four months before it was destroyed by fire. It is claimed that the doctrine of the case of *Wyman v. Wyman*, (26 N. Y. 253,) is applicable and covers the principle involved in this case. That case was not an action upon a policy of insurance; nor was the insurance company a party to the action; and consequently no question or objection was taken by the insurance company, to the contract, or as to the construction of the contract, but the insurance company in that case waived all questions (if any ever existed) and admitted that the money was

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due, and that they had no defense, and the company paid over or deposited the money to the account of whom it might concern, and the parties brought an interpleader to test the rights of the heirs, the administratrix, and certain creditors to the fund. The only condition in this policy of *Wyman v. Wyman* was as follows: "The interest of the insured in this policy is not assignable unless by consent of this corporation manifest in writing, and in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent, this policy shall be void and of no effect." The court say the foregoing clause "is to the effect that the interest of the assured in this policy is not assignable; and it is a transfer or a termination of the interest of the assured in the policy and not in the premises insured, which when made without consent, is to avoid the policy under this condition." But in the case at bar there is in this policy now under consideration, an agreement that in case of any sale, transfer, or change of title in the property insured, or of any interest therein without consent, this policy shall be void. Also in case of any assignment of the policy, or any interest therein, without consent, it shall be void. The case of *Wyman v. Wyman* is an authority against the plaintiff in this case. 2. It is conceded, in this case, that there was a change of title, but that it was by operation of law, and it is claimed such a change was not contemplated by the parties. In other words, they only intended to provide against transfer by bargain and sale. I insist the language of the contract in this case clearly shows that they did contemplate a change of title by sale or operation of law. Why do they use the terms sale, transfer, or change of title? Had they stopped with the first, or first and second expressions, there would be some foundation for the argument; but by the addition of the last expression it clearly appears that they understood that the company were to be notified

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of any change of title whatever, or however it might occur. The very next clause shows that they clearly intended to guard against change of possession or title by operation of law; it provides as follows: "And in case of the entry for the foreclosure of a mortgage or the levy of an execution or attachment, or possession by another of the subject insured, without the consent of the company indorsed thereon, this insurance shall immediately cease." This provision, requiring notice, is reasonable, is not simply a technical or unmeaning provision. It is of the essence of the contract, and one of the most essential provisions to protect the company in its ordinary and usual business. Let this doctrine prevail and we can have no confidence in the solvency of our insurance companies, for, notwithstanding a company refuse to take any risk except dwellings occupied by the most prudent persons or the safest possible risks taken, yet they may immediately be turned, by the insured or their representatives, into distilleries or powder manufactories, and this without notice to the company, and yet recover, the same as though they had faithfully performed their contract. What nonsense, then, the provision that the company may terminate either or any policy by returning a portion of the premium; for by having no notice of this increase of hazard, they would not be called upon to cancel the policy and return the premium; if they had the notice and neglected to do so it might be considered a waiver. And worse than useless is the provision, that if the insured shall make any misrepresentation, or concealment, or omit to make known any fact or feature in the risk which increases the hazard; or if after insurance is effected, such building or premises shall be occupied in any way so as to render the risk more hazardous than at the time of insuring; or if the risk be increased by any means whatever, &c., it shall be void, &c. 3. Again; if by the terms of this contract these provisions are not applicable to execu-

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tors and administrators, by the same reasoning it would not be applicable to "assigns," for they are included in the same clause, "his executors, administrators and assigns." It will hardly be claimed that an assignee of Shephard would be allowed to recover against this company, upon this policy, after violating its provisions as has been done in this case. This is a conditional contract that the title may be changed and policy continued if notice is given and consent obtained, which is a condition precedent. Upon a promise by one to pay when he can without distressing his family, you must show it would not distress them. (7 *John*. 37.) On a promise to pay when in funds, you must show the promissor has funds. (2 *Denio*, 377.) On a promise to pay what is needed, you must show need. (2 *Seld.* 168.) Upon a promise to pay if necessary, you must show necessity. (10 *John*. 359.)

3. But this policy is void on account of the concealment of the fact that a tavern was then kept in the house, and misrepresentation of Shephard at the time the insurance was effected, and would be void, even in his hands, and if so, is certainly void in the plaintiff's hands. It provides: "If any person insuring shall make any misrepresentation or concealment, or omit to make known any fact or feature in the risk which increases the hazard of the same, &c., the policy shall be void." This house was insured as a dwelling, and is so described in the policy. The referee finds in the sixth finding, that this house had, in fact, been occupied for many years before the fire, and up to the time of the fire, as a tavern or saloon. That Shephard had paid a higher rate of insurance on account of keeping a tavern or saloon, but at this time represented that he had discontinued keeping a tavern or saloon, and was now only occupying it as a dwelling, and on this account the rate was reduced, and a new policy issued insuring it as a dwelling-house. That saloons are generally deemed more hazardous than dwellings, and more premi-

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ums charged. The referee also finds that the defendant never knew of its being used as a tavern or saloon after this policy was issued, and the rate was thus reduced. The plaintiff testified that there had been a saloon kept in the basement of this house for thirty years prior to its destruction.

IV. The house being described in the policy as a dwelling-house, it is a warranty that it was used as a dwelling only. A dwelling-house is defined as the building and such attachments as are usually occupied and used by the family for the ordinary purposes of a house. (*Chase v. Hamilton Ins. Co.* 20 N. Y. 53.) Being a warranty, it is a condition precedent to the right to recover. In all contracts of marine insurance, the law implies an undertaking on the part of the assured that the vessel is of the character described in the policy; and all contracts of insurance are now construed alike, whether marine or fire. (*Howard v. Orient Mut. Ins. Co.*, 2 Robt. 539.) By the policy, it is expressly declared that the description of the property shall be considered a warranty by the assured. (*LeRoy v. Market Fire Ins. Co.*, 39 N. Y. 90.) It provides that all renewals shall be considered as continued under the original representation, in so far as it may not be varied by a new representation. The description and assertion of Shephard that no saloon was kept, was material to the risk, and if not a warranty, avoided the policy. In *Stetson v. Mass. Mutual Fire Ins. Co.*, (4 Mass. 337,) the court says: "The estimate of the risk undertaken by the insurer must generally depend upon the description of it made by the insured. A mistake or omission in his representation of the risk, either willful or accidental, avoids the policy." A warranty, being in the nature of a condition precedent, must be fulfilled by the insured before performance can be enforced against the insurer. (1 *Marsh. on Ins.* 335, 339.) In *Burritt v. Saratoga Mut. Ins. Co.*, (5 Hill, 188,) the court says: "The omission to disclose a

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fact material to the risk and not known to the underwriter, will avoid the policy, although the omission arose from mere accident, forgetfulness, or inadvertence; and this whether inquiry was made of the insured or not." "The parties have agreed, in and by the policy, that the misrepresentation or concealment shall avoid the policy, and we have nothing to do with the inquiry whether the fact misrepresented or concealed was material to the risk or not." The parties have agreed on the materiality of the thing warranted in this policy, and this agreement precludes all inquiry on the subject. (*Fowler v. Ætna Ins. Co.*, 6 Cowen, 673.) In 7 Wend. 270, the court says: "Here the parties have, by their contract, placed a misrepresentation or concealment in relation to particular facts upon the same footing as a warranty." Therefore the last clause of the sixth finding of fact and third conclusion of law by the referee, in this case, is erroneous; that the misrepresentation and concealment in this case does not affect the policy, because the fire was in no way influenced by such fact. It is not a question of fact to be considered by the referee—the parties have settled that by their agreement. (*Jennings v. Chenango Mut. Ins. Co.*, 2 Denio, 75. *Chase v. Hamilton Ins. Co.*, 20 N. Y. 53.) In *Boynton v. Clinton Ins. Co.*, (16 Barb. 254,) the court says: "When goods are insured and described as 'in the store part' of the building, and at the time of the loss the goods are in a different room of the building, occupied for a different purpose, the store part being then occupied by other persons, no recovery can be had." And a tavern or saloon having been then contained in the house at the time the policy was issued, it rendered the policy void. It existed at the commencement of the risk, and remained the same until the fire. The case of *Wall v. East River Mu. Ins. Co.*, (3 Seld. 370,) was to recover for goods insured, in a building described in the policy as being occupied as a

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storehouse, and the policy provided if it should be used and occupied for other purposes it should avoid the policy. It was used for making rope. Held that the description in the policy was a warranty, and the different use and occupation rendered the policy void. The court says: "Any statement or description in a policy of insurance which relates to the risk is a warranty, and a breach of a warranty avoids a fire, as well as a marine policy." The rule is the same in the case of insurance against fire as in that of a marine insurance. (*O'Neil v. The Buffalo Ins. Co.*, 3 N. Y. 122.) This tavern and saloon keeping cannot be considered as a temporary thing, and therefore not within the warranty, as in the case of 1 *Selden*, 469; for here the referee finds that it was continued for thirty years prior to and up to the fire. If this is a warranty, it becomes a condition precedent, and its materiality to the risk is of no importance. In *Chase v. Hamilton Ins. Co.*, (20 N. Y. 53,) the court says: "This was an insurance upon a stone dwelling-house; in fact the attached kitchen was wood, and the plaintiff claimed if he could not recover for the kitchen, yet he was entitled to recover for the upright or main building, which was stone." But the court held that it was a warranty and avoided the policy.

V. The house and barn being rented to and occupied by others, is a breach of the warranty contained in the policy, and avoids the policy. The policy provides that in case of "possession by another, of the subject insured, without the consent of this company indorsed hereon, this insurance shall immediately cease." Also, "if after insurance is effected, &c., such building or premises shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, or if the risk be increased by any means whatever," the insurance shall be void. This is a warranty, and the warranty has been broken, and the policy is void. (*Authorities above cited. Bigler v. N. Y. Central Ins. Co.*, 22 N. Y. 402.)

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VI. The plaintiff is not a trustee of an express trust, within the meaning of section 113 of the Code; and is not authorized by that section, or any other statute, to prosecute this action. By reading the last clause of that section it will appear that it does not cover this case. "A trustee of an express trust shall be construed to include a person with whom or in whose name a contract is made for the benefit of another." Now is the plaintiff the person with whom this contract was made; or was he the person in whose name this contract was made for the benefit of another? This contract was certainly not made with the plaintiff, nor was it made in his name, for the plaintiff, as administrator, was not in existence at the time this contract was made. The party who shall seek to assume the relation of trustee of an express trust, must at least have an existence at the time of the execution of the contract. The expression, "his executors, administrators," does not help out the case, nor show that the contract was in his name. Shephard did not know who would be appointed administrator of his estate after his death. How could the contract have been made in his name? How could he be the promisee in this contract? If, on notice of his appointment, they had assented, and adopted him as by the provisions of the policy, it would be different. There is no statute making the plaintiff a trustee of an express trust in this case. The case of *Considerant v. Brisbane* (22 N. Y. 399) is entirely different; and comes within the definition of section 113 of the Code. That action was brought upon a contract executed by the defendant to Considerant, "promising to pay Considerant, as executive agent of the company, \$5000," and the contract was made with Considerant in person, who was acting as agent for a foreign company. The court say: "Trustee of an express trust is intended to embrace not only formal trusts declared by deed *inter partes*, but all cases in which a person acting in behalf of a third party,

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enters into a written express contract with another, either in his own individual name, without description, or in his own name expressly in trust for," &c. Who were the parties to this contract? The insurance company of the one part, and Isaac Shephard of the other. A trustee of an express trust is a person who is interposed as the agent of the contracting party, between the promisors and the party equitably entitled to the fund or thing promised. In the case of *Considerant v. Brisbane*, above, the general term assumed the ground that where the promisee, though named in the contract, was mentioned only in respect of his official or representative character, and not as promisee individually, the promise would not be deemed made to him, and hence, such a case would not be embraced within section 113. But the Court of Appeals held that if the promise be to a person described as agent, and it appears upon the face of the writing, expressly or by implication, that it was made for the benefit of another, it is within the statute. They not only deem it necessary that there should be some person in existence to make the promise to, but that the promise should be made to him as a medium through whom it was to reach the principal. The principal in this case was Isaac Shephard. In *Wood v. Brown*, (34 N. Y. 342,) the court say: "A mere executor is not properly to be considered as a trustee, within the meaning of the statute." (See also *Lawrence v. Fox*, 20 N. Y. 269.) Shephard is the only person with whom, or in whose name, the contract was made. Administrator is no name, or name of an individual. Again; this policy provides that upon payment by the company of the loss, the person so receiving the pay shall assign to the company all claim he may have, and right to recover, against any person or persons causing such fire. Of what avail to the defendant in this case would it be to take an assignment from the plaintiff, for, having no interest in the real estate he could give none, and could give no right of action?

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And why is he entitled to recover in this case? The heirs should prosecute, and they would be able to carry out the contract with the defendant in this respect. We have not demanded an assignment of the plaintiff, for it would be useless.

VII. The promise to pay to Peter Lappin, as administrator, if made, was void. 1st. There was no consideration for the promise, and it was void for that reason. As to consideration, if Lappin had stepped in and adopted this contract during its existence, the consideration paid by Shephard might have enured to his benefit and upheld the contract. But the difficulty is, he was not in existence, and could not; he attempted to seize the defunct contract as soon as he received his official garment, but it was too late. It was dead, and could not be resuscitated by introducing a new man into it as promisee. 2d. There was no privity or mutuality between the plaintiff and defendant. Suppose, on the last day of the existence of this policy, the defendants had desired to pay it, could they safely have paid it to the plaintiff? Most certainly not. In *Lawrence v. Fox*, (20 N. Y. 268,) the principle of recovery upon a promise made to a third person is fully discussed.

VII. The plaintiff in this case, if entitled to recover anything, was only entitled to recover the value of the personal property, \$48. Even personal property does not go to the administrator, unless it appears necessary to pay debts; and this is a condition precedent to be shown before a recovery can be had. (*Bradner v. Falkner*, 34 N. Y. 347.)

B. B. & G. N. Burt, for the respondent.

I. By the very terms of the policy, the defendant agreed that in the event of the death of the assured, owning the property, and a fire occurring during the life of the policy, it would pay the amount of such loss to his executors, ad-

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ministrators or assigns, as the case might be, and in this case agreed to pay it to the administrator. The policy does not avoid the contract upon the transfer of the title of the property by descent to the heir, and the devolution of the right of action to the administrator, but expressly preserves the right of action, and continues and extends the privileges of the agreement to the administrator of the assured. Thus the contract of insurance, by the death of Shephard, became by its terms a contract with his administrator for the protection of the interest of his heirs. So that the right of action became vested in one person, while the interest in the property insured, which was requisite to sustain the action, belonged to another. The administrator was a trustee of an express trust. The right to sue in his own name is preserved under the Code, (§ 113.) Every principle in this case, (so far as the right of the plaintiff to maintain the action is concerned,) is fully settled in the case of *Wyman v. Wyman*, (26 N. Y. 253.)

II. There was no warranty in the policy, and the defendant could not vary it in any way by parol proof. (*Alston v. The Mechanics' Mu. Ins. Co. of Troy*, 4 Hill, 329.) The proof shows that for thirty years prior to the destruction of the dwelling, the basement had been used for a saloon. It also appeared that this company (the defendant) had insured it as a saloon for four of five years prior to the issuing of the policy in question; and from the fact that he was not restricted at all in its use, nor who should occupy it, by the terms of this policy, the defendant cannot complain. So far as the barn was concerned, there was nothing in the policy that prevented the assured himself, or others to whom he might rent it, from occupying it as barns are generally used. This case illustrates how small a hole an insurance company will attempt to crawl through, after receiving premiums for years, and a loss occurs, without any fault on the part of the assured, or those holding under him.

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By the Court, JOHNSON, J. The action is properly brought in the name of the plaintiff as administrator, if a right of action accrued to any one, by reason of the destruction of the property, upon the contract of insurance. The agreement on the part of the defendant was, in terms, "to make good unto the said assured, his executors, administrators and assigns, all such immediate loss or damage not exceeding in amount the sum insured, as shall happen by fire to the property as above specified, from the 7th day of December, 1867, at noon, to the 7th day of December, 1868, at noon." The plaintiff is the administrator of the assured, and the contract is with him, the assured being deceased; and he prosecutes for the benefit of the person or persons entitled to the moneys recovered on account of such loss, provided the contract remains in force, notwithstanding the change of title to the property insured. (*Wyman v. Wyman*, 26 N. Y. 253.)

The policy in question was regularly renewed for one year, from and after the 7th of December, 1868. On the 21st of July, 1869, the assured died intestate, and the property insured descended to his heirs at law. On the 9th of November, 1869, the fire occurred which destroyed entirely the property so insured. The plaintiff was appointed administrator on the 10th of January thereafter, 1870. It thus appears that the property insured had changed hands nearly four months before the loss; but the fire was within the time to which the policy of insurance had been extended. The loss was wholly the loss of the heirs who inherited the property, and in no respect the loss of the estate represented by the plaintiff. They had owned it several months before the fire, and the loss thereby occasioned; and the question arises whether the contract can be enforced in their favor, or whether it remained in force at all, after the death of the assured and the transfer of the title to his heirs. The contract provides that the policy shall not be assignable, before or after loss,

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without the consent of the company manifested in writing thereon; and further, that "in case of assignment without such consent, whether of the whole policy, or of any interest in it, the liability of the company shall then cease." It is also provided that "in case of any sale, transfer, or change of title, in the property insured by this company, or of any interest therein, such insurance shall be void and cease." There is also a further provision as follows: "And in case of the entry for foreclosure of a mortgage, or the levy of an execution or attachment, or possession by another of the subject insured, without the consent of this company indorsed hereon, this insurance shall immediately cease." No consent had been indorsed upon the policy by the company, at the time of the fire, and there had been, long before, not only possession by others than the assured, of the subject insured, but a complete change of title also.

It seems clear, therefore, that the policy of insurance, by the most clear and explicit terms and provisions thereof, became void, and ceased to have any binding force, upon the death of the assured, and the vesting of the title to the property insured in his heirs at law. That this was a change of title, from the assured to others, cannot be denied, and it brings the case within the express terms of the policy. The possession of the property insured, by others than the assured, without the consent of the company indorsed upon the policy, also produces the same result. It puts an end to the contract, and renders it no longer obligatory.

It is claimed on behalf of the plaintiff that the policy being, in terms, payable to the administrator of the assured, it cannot be held to mean, or to extend to, a change of title by the decease of the assured, and the descent of the insured property to his heirs, or to possession by his heirs in such an event, but must be held to mean change of title, or of possession, by some act of the assured, or by some oper-

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ation of law other than that which would flow from the death of the assured intestate. The case of *Wyman v. Wyman*, (*supra*,) is relied upon as authority to sustain this proposition. But the two cases, it will be seen, are quite different. In that case the provision was, "the interest of the insured in this policy is not assignable unless by consent of this corporation manifest in writing; and in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent, this policy shall be void and of no effect." Emott, J., who delivered the opinion in that case, says, in reference to this provision: "The clause is to the effect that the interest of the assured in this policy is not assignable; and it is a transfer or termination of the interest of the assured in the policy, and not in the premises insured, which, when made without consent, is to avoid the policy under this condition." And it was held that inasmuch as the policy was a mere personal contract with the assured, and had not been assigned in fact, it had not become void under that provision, but was valid in the hands of the administrator, and might be enforced if it covered the loss. The same construction was given to a provision in policies of insurance almost precisely similar in terms, in *Smith v. The Saratoga Mu. Fire Insurance Co.*, (1 Hill, 497,) and in *Phelps v. The Gebhard Fire Insurance Co.*, (9 Bosw. 404.) But here the very condition exists which was absent in those policies, to wit, the termination of the interest of the assured, "in the premises insured." The language is general, and is not limited to a change of title or termination of interest in any particular way, or from any one cause more than another. It is, "in case of any sale, transfer or change of title in the property insured, or of any interest therein, such insurance shall cease and be void." No matter how the transfer or change is brought about, if it is made at all, in any way, the insurance ceases and becomes void. This provision in the contract, it is to be observed, is not conditioned, or

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made dependent upon, the consent of the insurers in any form, but is absolute and unconditional. In this respect it differs entirely from the terms of the policy in the case of *Burbank v. Rockingham Marine Fire Insurance Co.*, (24 N. H. 550.) In that case the contract was "to insure Samuel Burbank and his heirs, executors, and administrators and assigns the aforesaid property against loss or damage by fire, subject to the provisions and conditions of the charter and by-laws of said corporation." One of the provisions of the charter was, "that when any house or other building shall be alienated by sale or otherwise, the policy shall thereupon be void, and be surrendered to the directors of said company to be canceled." The decision there turned upon the meaning of the word "alienated;" and it was held that where property descended to the heir of a deceased person intestate, it was not alienated, within the common law definition and meaning of that term, and therefore the change of title, in that case, did not fall within the terms and meaning of that provision of the charter. Here the provision of the policy is not restricted to an alienation of the property insured, but extends to every conceivable transfer, or change of title, or interest.

In *Phelps v. The Gebhard Fire Ins. Co.* (*supra*), there was no provision in the policy on the subject of a transfer of the property insured, but only of the contract, as in the case of *Wyman v. Wyman*; and besides, the company had renewed the policy to the executors of the assured, to whom the property had been devised. And in *Smith v. Saratoga Mu. Fire Ins. Co.* (*supra*), the provision related to a transfer of the interest of the assured in the contract, only. Neither of those cases has any bearing upon the provision of the contract in the case at bar, in respect to "any sale, transfer or change of title in the property insured, or of any interest therein."

There is, as has been seen, in the policy here, the same provision in regard to the assignment of the policy, or of

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any interest in it, without the consent of the company in writing, as in the cases before cited. And there is also the provision that a change of possession of the property insured, without the consent of the insurers indorsed on the policy, shall render it void. But the change of title is not subject to any such condition; and the question is whether the change of title does not of necessity, by the very terms, and plain meaning of the parties, render the contract void and of no effect. It seems to me it must do so. There is certainly no equity in favor of the heirs, which can operate to keep the contract alive, or continue it in force against the defendants, contrary to the express terms of the instrument. The heirs have paid the defendants nothing, and they have certainly no greater equities against the defendants than a judgment creditor or mortgagee would have had, who might have acquired his title by virtue of judgment or of mortgage foreclosure. There is no conceivable reason for straining the provisions of the contract, if we were at liberty to do so, in favor of the heirs at law of the insured. The loss would have been payable to the plaintiff as administrator, had it occurred in the life of the intestate, and not been paid to him, whether it was so expressed in the policy or not; and it must be presumed, when it is so expressed, that it was intended to provide for payment to the administrator in a proper case. It cannot be presumed that it was intended to provide for payment to the administrator, in a case where, by the express terms of the policy, it was to "be void and cease." Full effect may be given to that part of the promise, by applying it to the case of a loss happening under conditions which did not affect the validity of the policy. It was, I think, assumed, if not distinctly held, in *Wyman v. Wyman*, (*supra*,) that an action might have been maintained by the administrator, in such a case as that, against the company, though the question was not before the court for consideration. But that was upon

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the distinct ground that the policy was still in force, and had not as a contract been subjected to any condition provided for which should render it void. The question before the court in that case, and the only one, was whether the administrator or the heirs at law, or the judgment creditors of the deceased, were entitled to the fund. The company had paid the loss over for the benefit of any party who might be adjudged entitled to it.

I am inclined to the opinion that the policy was also void and of no force or effect, by reason of the property having been described, and insured, as a dwelling-house, when in fact it was used in part as a saloon, which, as the referee finds, increased the risk. The description is made part of the contract, and a warranty by the assured, and it is expressly provided, among other things, that in case of any misrepresentation or concealment, or omission to make known any fact which increased the hazard, the insurance should be void. But as the case seems entirely clear upon the other point, it is unnecessary to decide this.

The judgment must therefore be reversed, and a new trial ordered, with costs to abide the event.

[FOURTH DEPARTMENT, GENERAL TERM, at Syracuse, November 14, 1870.
Mullin, P. J., and *Johnson* and *Talcott*, Justices.]

SOLOMON GRAVES vs. CLARINDA H. SPIER.

The prayer for relief, in a complaint, is no part of the cause of action, and does not determine the character of the action.

The nature of the action, and the cause of action, are shown by the facts stated in the complaint.

Where the facts stated in a complaint constitute a cause of action for the recovery of damages for false and fraudulent representations made by the defendant in negotiating the sale and transfer of a bond and mortgage in payment for land purchased, and the prayer for relief is a demand of judgment for damages in a specified amount, the action must be held to be, and treated as, an action at law to recover the damages sustained by reason of the fraud.

And this, notwithstanding there is also a prayer for relief in the alternative—"or that the defendant be adjudged to reconvey the premises," to account for the use, income and profits thereof, or for other relief; where no cause of action which could entitle the plaintiff to the alternative relief is stated in the complaint.

A cause of action for fraud in the purchase and sale of real estate survives, to and against the personal representatives of a deceased party to the transaction, and is therefore assignable, so that the assignee may maintain an action upon it.

A married woman is liable for the fraud of her husband acting for her, as her agent, in the purchase of real estate, although she was wholly ignorant of the fraud practised, and did not authorize it; where she had the fruits of the bargain, kept the property bargained for, and sold it, and retains the proceeds.

She will be held, under such circumstances, to have made the instrumentalities, by which the property was procured, her own. And the law will impute the wrong to her, as it was done for her benefit and she retains the advantage.

Where, upon the purchase of land by a married woman, through her husband acting as her agent, the husband makes false and fraudulent representations respecting a bond and mortgage given in payment of the purchase money, knowing them to be false; and such representations are material, and the vendor relies upon them, and sustains damages in consequence, an action can be maintained by him, or his assignee, against the wife, for the fraud.

In such an action the measure of damages is, the difference between the value of the mortgage debt as it would have been had the mortgaged premises been free from all prior incumbrances, as represented, and its value as it turned out to be, with the mortgaged premises incumbered by prior mortgages and judgments.

Where, in such a case, two prior mortgages were foreclosed by action, and the premises sold, in satisfaction thereof, and the same were struck off to the plaintiff's assignor, and an execution issued in an action brought by him

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upon the bond was returned unsatisfied; *Held* that the plaintiff was entitled to recover of the defendant the whole amount of the mortgage debt, over and above the surplus arising from the sale under the prior mortgages, with interest on that balance, by way of damages.

Assignments introduced in evidence are not void because the stamps thereon are not canceled; where there is no evidence, or room for pretense, that they were left uncanceled for the purpose of defrauding the government.

Where a reference is by consent, and the action is tried without objection that it is not a referable action, no question can be raised, on appeal, in regard to the mode in which it was tried.

A PPEAL from a judgment entered upon the report of a referee.

In the year 1861, Margaret S. Graves was the owner of a separate estate, consisting of valuable premises situate in the village of Geneva, N. Y., upon which she then resided with her husband, the planitiff in this action. At the same time, the defendant, Clarinda H. Spier, was also a married woman, the wife of David S. Spier, and resided with her husband at Albany, N. Y. She was possessed of a large separate estate, and, among other things, was the owner of a bond and mortgage executed by William H. Walker and wife, upon certain premises in Schodac, Rensselaer county, N. Y., conditioned for the payment of \$8500 and interest, and known in this case as the "Walker" bond and mortgage. The defendant and her husband had previously resided in Geneva, and wished to return and purchase a residence there, and with that view opened negotiations with Mrs. Graves, in the latter part of the summer of 1861, for the purchase of her premises in Geneva, which negotiations resulted, on the 8th day of October following, in the exchange and transfer of said Geneva property for the Walker bond and mortgage. The sole consideration received by Mrs. Graves for the transfer of the Geneva property, was an assignment of said Walker bond and mortgage. The negotiations, throughout, were conducted by the plaintiff, her husband, in behalf of Margaret S. Graves, and by David S. Spier, her

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husband, and Levi Safford, a real estate broker residing in Albany, in behalf of the defendant. It was admitted that Solomon Graves and David S. Spier were each the general agents in managing the estates of their respective wives, and also, that each acted as the agent of his wife in conducting the negotiations which resulted in effecting said exchange. During the negotiations, the said David S. Spier and Levi Safford, as agents in behalf of the defendant, represented said Walker mortgage to be the first and only lien and incumbrance of any kind upon the premises in it described, and that said premises were of much greater value in the market than the face of the mortgage, claiming and representing that they knew all about the premises, the incumbrances and title thereto, affirming that the farm had repeatedly passed through their hands, and that they had personal knowledge and information of the title and incumbrances. On one occasion they also produced what purported to be a search of the premises described in said mortgage, and exhibited it to said Graves, from which it appeared there were no other incumbrances upon said premises, which they represented to be a true search; and assigning some reason for temporarily retaining the same in their possession, took it away, promising but in fact evading a return thereof to Graves for further inspection, and though efforts have been made, the plaintiff has been unable to find the same. Said representations were false in fact, and confiding in them, Margaret S. Graves was induced to convey the premises to the defendant. At the time of said negotiations and transfer, there were two prior mortgages upon the premises described in the Walker mortgage, and one judgment; upon which mortgages and judgment there remained due and unpaid, in the aggregate, the sum of about \$5000, which were valid and prior liens. The oldest of said prior mortgages was foreclosed

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in 1863, and the premises sold upon foreclosure sale. Mrs. Graves realized about \$1100 out of the surplus moneys arising therefrom. The bond accompanying said mortgage was worthless, and said Walker was insolvent. This action was brought to recover damages for the injury and loss sustained by Mrs. Graves and her assignee, resulting from the fraudulent representations made.

Before the commencement of this action, Mrs. Graves assigned her claims against the defendant for the injury sustained by her to William F. Eddington, who transferred the same to this plaintiff. And before the commencement of this action, the defendant was fully apprised of the fraud, principally perpetrated by her agents, and was tendered a reassignment of said Walker bond and mortgage, and a judgment subsequently obtained against him on said bond, and she was requested to reconvey or return the avails of said Graves' property, but she refused to do anything in the matter, and persisted in retaining the fruits of the transaction.

The complaint set forth the above facts, substantially, and demanded a reconveyance, or judgment for the full value of the premises.

The answer admitted the existence of prior mortgages, denied any false statements, and set out as a separate defense that the plaintiff had not offered to reconvey within proper time, and had affirmed the exchange after full knowledge of all the facts, including those constituting the alleged fraud.

The cause was, by consent of counsel, referred to Hon. W. H. Smith, to hear and decide. Several questions were raised upon the trial, which appear in the points of counsel. The referee reported in favor of the plaintiff, and assessed the damages at \$7652.22.

Judgment was entered for \$8218.40, from which judgment the defendant appealed to this court.

McDonald & Rose, for the appellant.

I. This action is an action in equity for the rescission of the contract and return of the property, or the repayment of the value paid, because the defendant had disposed of the property, and hence an actual return could not be made. The plaintiff should succeed, if at all, according to the rules of law which govern such cases. It was not claimed on the trial, and we suppose is not now, that the plaintiff could succeed if this is to be adjudged an equitable action. Hence the judgment should have been for the defendant. 1. The proof shows that, considered as an action in equity, the defendant must have judgment, because, (a.) The plaintiff or his grantor did not rescind the whole contract. (b.) The attempted rescission was not prompt, but too long delayed. (c.) After full knowledge of all the facts constituting the alleged frauds, the plaintiff's assignor affirmed the contract, by taking benefits under it. (*Wheaton v. Baker*, 14 Barb. 594. *Stevens v. Hyde*, 32 id. 182. *Lawrence v. Dale*, 3 John. Ch. 23. *Fisher v. Fredenhall*, 21 Barb. 82.) 2. That this action must be considered and decided as an equitable and not a legal action, is shown, (a.) By the pleadings. The issue joined is an equitable issue. The only difference in cases of fraud, between an equitable and legal action, is that in an equitable action you must allege and prove certain additional facts. You must allege and prove all you do in a legal action, and more too. Again; in equitable actions there are several defenses not good in legal actions. In this case the complaint is, in all strictness, in a suit in equity. It alleges the various transfers of the Walker bond and mortgage and judgment obtained on the bond, and final offer to return the same to the defendant, and demand for reconveyance. These facts are absolutely necessary in an equitable action—entirely immaterial and irrelevant in a legal action. The demand for relief is in

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strict accordance with the facts alleged. The defendant, having sold the property, could not make restitution; hence the demand for relief in the alternative for the reconveyance of the property or payment of its value. Again; the second defense in the answer which was admitted on the trial, is a perfectly good one in equity. In a legal action it would be entirely frivolous. (b.) The cause of action, as proved, was a strictly equitable one. As to the transfers of the property received, and final offer to return to the defendant, the proof was made, and, even after the referee had decided that the action might be considered as a legal action, was retained against a motion to strike out. Hence, as the pleadings and proof show this to be an equitable action, it should have been decided as such; and the second defense having been admitted true on the trial, the judgment should be for the defendant. Formerly the equitable action for rescission could not be brought in the same court as the legal action for deceit. Though by the Code there is now one forum, the essential difference between these actions has not been changed, nor could it be. (*Ely v. Mumford*, 47 Barb. 633. *Reubens v. Joel*, 13 N. Y. 491. *Voorhis v. Childs*, 17 id. 358. *Goulet v. Asseler*, 22 id. 228. *Heywood v. Buffalo*, 14 id. 540.) Actions must be proven as pleaded. You cannot frame one issue and try another. You must try the issue in the pleadings; otherwise, it is not a variance, but a failure of proof. (*Smith v. Countryman*, 30 N. Y. 676. *Walter v. Bennett*, 16 id. 250. *Ransom v. Wetmore*, 39 Barb. 104. *Moore v. McKibbin*, 33 id. 246. *Craig v. Hyde*, 24 How. Pr. 313. *Gasper v. Adams*, 28 Barb. 441. *Bradley v. Aldrich*, 40 N. Y. 507. *Mann v. Fairchild*, 2 Keyes, 112.) Had the plaintiff asked to amend his complaint so as to allege a cause of action for deceit, the court could not grant his motion, as it would substantially change his cause of action, which is not allowed. (*Catlin v. Hansen*, 1 Duer, 327.

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Woodruff v. Dickie, 31 *How. Pr.* 167.) Much less could the plaintiff change without an amendment.

II. By the action and decision of the court below, the defendant has been deprived of the right of trial by jury. If this action is a legal action for damages, then the defendant had the right to a trial by jury guaranteed by the constitution. If it is an equitable action, the question of trial by jury is in the discretion of the court. It is just as much the denial of a right to reduce it to a matter of discretion, as to deny it altogether. This cannot be done, either directly or indirectly. It was done in this case, and the defendant had no legal remedy. (*Sands v. Kimbark*, 27 *N. Y.* 147.) 1. The defendant could not have stricken out any allegations of the complaint as irrelevant, under section 160 of the Code. All of them were consistent with the cause of action stated and the relief demanded. (*Cowenhoven v. Brooklyn*, 38 *Barb.* 9. *Moore v. McKibbin*, 33 *id.* 246.) 2. The defendant could not have demurred, as suggested by the referee, because, (a.) There was only one cause of action stated in the complaint. (b.) Even if there had been two causes of action improperly stated, demurrer is not the proper remedy, but a motion to make the plaintiff elect which cause he will prosecute. (*Meyer v. Van Collem*, 7 *Abb. Pr.* 224. *Lattin v. McCarty*, 7 *How. Pr.* 239.) (c.) The motion that the plaintiff elect we have made, and it has been denied. (See 3d point.) Hence the defendant had no mode provided by law by which he could insist upon and compel his right of trial by jury, if this is to be tried as a legal action. To be sure he did not try any of these remedies, but no party is to be held to try what cannot be, or lose his rights for failure to make such useless effort. 3. In cases where the right of trial by jury is undoubted, or where, by the complaint, the plaintiff sets out a legal action, but the defendant sets up an equitable defense, it is held that the person claiming the right of trial by jury must have claimed it below, or

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he will be deemed to have waived it. This is true, because had he asked it in such case it would have been granted him by the court below as matter of right. In this case it was not a matter of right; hence the defendant lost no right by not asking. (*N. Y. and N. H. Railroad Company v. Schuyler*, 34 *N. Y.* 46. *Bradley v. Aldrich*, 40 *id.* 511.)

III. Even if it should be admitted that the plaintiff can thus unite in one complaint two causes of action arising out of the same transaction, the one equitable, the other legal, then it must be held that on the trial, on request, the plaintiff must elect which of the two he will proceed with. "He cannot carry water on both shoulders." Such was the rule before the Code. (*Rogers v. Vosburgh*, 4 *John. Ch.* 84. *Walter v. Bennett*, 16 *N. Y.* 250. *Craig v. Hyde*, 24 *How. Pr.* 313.) Hence the referee erred in his ruling refusing to make the plaintiff so elect; and also in his refusal to strike out evidence.

IV. Even regarding this action as a legal action for deceit well brought, yet the plaintiff is not entitled to judgment. 1. There is no proof that the defendant or any authorized agent of hers ever made any false statement, knowing or having reason to believe it to be false. To warrant any recovery for fraud, the evidence must show that the false statement was made knowing it to be false, with the intent to deceive. Deceit is the foundation of such actions, and that in its nature must be intentional. (*Marsh v. Falker*, 40 *N. Y.* 565, and note at end of p. 575. *Broom's Leg. Max.* 714, and cases cited. *Weed v. Case*, 55 *Barb.* 548. *Moore v. Noble*, 36 *How. Pr.* 388. *Hilliard on Torts*, ch. 1, § 29.) Such intentional deceit or fraud must be proven, beyond any reasonable doubt; it cannot be presumed. (*Nichols v. Pinner*, 18 *N. Y.* 300.) In this action the case shows no finding that any one intentionally misstated anything except David S. Spier. The referee finds that he did. This we say is entirely unsupported by proof.

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As we have shown by our statement hereinbefore, there was the same identical proof of knowledge against the plaintiff's witness, Safford, as against David S. Spier. The only difference between them was, Safford was living, Spier dead. As to Safford, he finds "that it does not appear in proof that Levi Safford knew the representations he made were untrue." As to Spier, he finds he did know. This is construing evidence more strongly against the dead, who cannot defend themselves, than against the living, who can. We submit that such is not the rule, and especially in a case like this, where the plaintiff and his assignors wait till the pretended claim is nearly outlawed, after full knowledge of all the facts, (from December 1861 to April 1867,) till after Mr. Spier dies, and then immediately commence this action against his widow, who is admitted to be innocent in all respects. The death of Spier, it seems, was the birth of this action. We submit there is no proof of knowledge on the part of the deceased husband, Spier. (a.) He was in no way liable to pay the prior mortgages, or either of them. (b.) The proof shows that the county clerk's search was duly signed by him, went back to a good source of title, and was in the same condition when shown Safford, Mrs. Graves and the plaintiff, as when signed by the county clerk. The referee finds there is no proof to the contrary. (c.) The search was relied upon, and deceived three living persons—Mr. Safford, Mrs. Graves and the plaintiff. Why may it not be supposed it also deceived Mr. Spier. (d.) The only mode in which Mr. Spier can be held to have known of the mistake in the search, is to suppose that he and the county clerk, by conspiracy, got up a search to deceive, or that Mr. Spier, after the county clerk had made the search, so altered it or garbled it as not to show these two prior mortgages, thus committing forgery. Safford and Mrs. Graves and the plaintiff all examined it, and noticed nothing wrong about it. Safford, as land agent, was accus-

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tomed to examine searches, especially those from this county clerk's office. Can such a supposition of fraud be sustained on such evidence? Is it not rather more in accordance with the rules of evidence to presume that Mr. Spier, like the other three, relied upon the search, and was himself deceived, and that there was an unintentional mistake in the search? 2. Mrs. Graves, the person who made the bargain and executed the deed to the defendant, and heard all these alleged false representations, did not rely upon and was not deceived by any representations made by David S. Spier. Simple misstatements, even although intentional, do not warrant a judgment. There must be reliance thereupon, and consequent injury. (*See cases above cited.*) (a.) Mrs. Graves herself swears, "I confided and trusted in Safford's representations. Upon his statements and the search I sold the property." She entirely ignores any reliance on what was said by David S. Spier. (b.) The nature of the subject matter about which the representations were made—title to land—is such that in case a search was produced it would be made the main reliance. They required a search, got one, relied upon it and were deceived thereby. It has even been held that an intentional misstatement about title will not constitute an actionable fraud, on the ground that any person who relies upon such statement, and does not examine the records, is guilty of negligence. (*Tallman v. Green*, 3 Sandf. 442, and cases cited. *White v. Seaver*, 25 Barb. 242.) (c.) As to the pretended statement that the search was a true search, the above rule should apply, because the search is obtained to prove the title, and it and the evidence of its verity is of a higher nature than any parol statement. The seal of the court and signature of the clerk is the proof of which even courts must take notice and recognize. It is reasoning in a vicious circle, to say that a person is not warranted in relying upon a parol statement as to title, because he should procure a search or have the records examined, and

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then say that any parol statement about that very search is actionable. But as we have said, this whole claim of fraud is disposed of by supposing either that the county clerk unintentionally made an error in the search, and thus all were deceived, or by supposing that the search was so made as not to be fully understood by all the parties examining it. This is the more rational explanation, and may be the very one the lawyer Graves applied to, after hearing of the existence of these two mortgages, gave him. We submit it should be the one adopted by this court, especially as against innocent living defendants and deceased accused witnesses, and in favor of persons who have held their peace during about five years, while such witness was living, and could have been heard to give his explanation.

V. It is true the referee has found that the witness Safford and David S. Spier represented that the farm was worth more than the mortgage, while he has found as matter of fact that it was worth less. But this was not made any ground for his decision, neither indeed could it be. 1. The referee, in stating the representations on which Mrs. Graves exchanged, only mentioned those as to title. Also, in stating in what the statements were false, he only states as to title. 2. A false statement of value would be as to matter of opinion, and not fact, and hence is no ground for action. 3. But as to the matter of the value of the premises, Mrs. Graves did not rely on any statements of Safford or Spier, but wrote to a friend, received an answer, and relied upon that.

VI. This action is brought on account of fraud in the transfer of a certain bond and mortgage, and is brought by the assignee and purchaser of said mortgage, with full knowledge of all the facts. He cannot offer to return them to a third party and claim damages on account of fraud practiced upon his assignor. (*Borst v. Baldwin*, 30 Barb. 180.)

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VII. Had the plaintiff made out an equitable cause of action for rescission, such a cause of action might possibly be assignable; but a legal cause of action for deceit is not, and never was, assignable. (*Prosser v. Edmonds*, 1 *Young & Coll.* 481. *McMahon v. Allen*, 34 *Barb.* 56. *Zabriskie v. Smith*, 13 *N. Y.* 333, at foot of page. *Lamphere v. Hall*, 26 *How. Pr.* 510, and cases cited. *Shoemaker v. Kelley*, 2 *Dall.* 213; 1 *Yeates*, 245.) It is sometimes said in the books, that whatever passes to personal representatives is assignable. But these dicta are expressly disapproved in *McMahon v. Allen*, (34 *Barb.* 65;) *Sheldon v. Wood*, (2 *Bosw.* 278;) *Hyslop v. Randall*, (4 *Duer*, 663.) If the cases in which these dicta occur, (such as *Haight v. Hayt*, 19 *N. Y.* 464,) are carefully examined, it will be found they decide that whatever is assignable passes to the personal representatives; but not the converse—that whatever passes is assignable. The proposition refers to whatever passed to the personal representatives at common law, for the rule holds in the United States courts and in England. (*Comegys v. Vasse*, 1 *Pet. U. S.* 213. *Raymond v. Fitch*, 2 *Crompt. Mees. & Wels.* 588.) Hence when, by the Revised Statutes, the range of causes of action that pass to the personal representatives is enlarged, that does not, *per se*, make those which were added assignable. The statute says nothing about assignees, and hence assignability is not affected thereby. (*Thurman v. Wells*, 18 *Barb.* 510.) Again, the cases of *Zabriskie v. Smith*, and *Lamphere v. Hall*, (before cited,) which expressly hold that such causes are not assignable, were lately decided—long after the Revised Statutes.

VIII. Even if assignable, the plaintiff never acquired title. 1. If it be considered an equitable action, then the assignment of the bond and mortgage would be necessary to give the plaintiff title. It is not claimed that the stamps on them were sufficient, and they were finally withdrawn, or, as the case has it, were not offered in evidence. 2. Con-

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sidered as an action for damages, the transfers C and H, would not transfer the title. They contained a power of attorney, and hence are void because they were not stamped with a fifty cent stamp. (*Stamp Law*, §§ 158, 170.) The introduction of papers was duly objected to.

IX. The measure of damages adopted by the referee was not the true one. The facts found, on which it rests, were contrary to the evidence given and received, and the rules of law applicable; and the plaintiff's evidence on that point given, received and duly objected to, was improper, and that offered by the defendant, rejected and duly excepted to, was legal and proper. 1. The true rule of damages would be the difference between the Walker bond and mortgage, as they were represented to be, and as they in fact were. There is no proof of the value of the bond and mortgage on either supposition. The rule adopted would seem to be the amount of the prior incumbrances. This is the rule in case of a deed with covenants. But it has no application to this case. The bond is the debt. The mortgage is not valid separated from it. If the bond is good it is immaterial what the mortgage is. Besides, this theory is absurd upon its face. A second mortgage may be perfectly good for its full amount, provided there is property enough to pay both. 2. The facts found in deciding damages are against law and the evidence. (a.) The finding that the judgment of Van Hoesen was a prior lien to the mortgage. The mortgage was for purchase money. It needs no authority to show that a judgment against the mortgagor cannot be prior to a purchase money mortgage made by him. (b.) The finding that the Walker bond was worthless October 1, 1861, is against the evidence and law. This supposes the maker, Walker, insolvent. Insolvency, like fraud, must be proven. (*Walrod v. Ball*, 9 Barb. 271.) Here the proof, like the presumption, was that he was solvent. (c.) The finding that the mortgage, if as represented, would have been

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worth, October 8th, 1861, \$8852.03, is unsupported by, and contradicted by, the evidence. The referee also finds that on that day the land conveyed by the mortgage was worth only \$8193.75. Hence the mortgage was worth more than the land. 3. The evidence admitted on proof of damages was improper. (a.) As the wrong rule of damages was adopted, all evidence in support of and in accordance with such rule must be wrong. (b.) The proof of the value of the farm was improper. The knowledge of it was necessary to fit a witness to give proper testimony of value, but as an independent fact it is immaterial. So also as to evidence as to the condition and quality of the farm. (c.) The evidence of the plaintiff as to the value of the Walker bond and mortgage was improper, and his testimony untrue, and it was so found by the referee. He did not show that he knew anything about the value of the farm covered by the mortgage, the responsibility of Walker, the maker of the bond, or that he had any knowledge of the value of bonds and mortgages in any market. To give an opinion the witness must show qualifications peculiar to himself as connected with the subject matter. (d.) The evidence of the amount of surplus moneys received by Mrs. Graves clearly had nothing to do with damage arising from the plaintiff's alleged fraud. (e.) If the referee was right in admitting evidence as to the amount received from surplus moneys, he was clearly wrong in granting the plaintiff's motion to strike out evidence as to what Mrs. Graves sold the farm for, and thus realized. (f.) The proof of amount of surplus moneys and the judgment rolls, showing the sale in 1863, were clearly improper, even on the question of the value of the farm in 1861. A sale at or about the time is some slight evidence of value, but a sale two years after, is none; hence, as we have shown, a wrong rule of damages was adopted by the referee. It was supported by improper evidence, and his findings on the wrong rule thus improv-

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erly proven were against such evidence and the presumptions of law, and the judgment is therefore wrong and should be reversed.

X. If we are right in our former points, then the referee erred in denying the motions of the defendant for a nonsuit at the conclusion of the plaintiff's testimony, and again at the close of the whole testimony.

XI. As this is an equitable action, and as the facts proven and uncontradicted, (*point 1, subd. 1,*) show that such action can in no way be maintained, this court should not only reverse the judgment entered upon the report of the referee, and grant no new trial, but should grant a judgment absolute for the defendant, with costs. (*Bradley v. Aldrich*, 40 N. Y. 504. *Edmonston v. McLoud*, 16 N. Y. 543.)

W. F. Diefendorf, for the respondent.

I. This action is brought to recover damages of the defendant, growing out of false and fraudulent representations made by her in negotiating the sale and transfer of a certain mortgage to Margaret S. Graves; and to warrant a recovery, it was incumbent upon the plaintiff to establish, on the trial, that the defendant, or her agents for her, perpetrated a fraud upon Mrs. Graves, the original assignor of the cause of action, and that damages ensued to her therefrom. 1. Assuming that burden, we will first briefly advert to the proof establishing the fraud. The principal evidence upon this point appears from the testimony of Solomon Graves, the plaintiff, Margaret S. Graves, and Levi Safford. The representations were principally made by the defendant's husband, David S. Spier, and Levi Safford, a broker, both of whom acted as the agents of the defendant. There is no positive proof in the case that the defendant, personally, made any representations, or knew that any were being made at the time. There are, however, circumstances in the case, strongly tending to prove such knowledge on her part. The rep-

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representations were made at different times during the negotiations for the sale and exchange of Mr. Graves' premises in Geneva, described in the complaint, for a mortgage on premises in Rensselaer county, N. Y., and consisted in the statements that the said mortgage was a good mortgage upon premises worth more than the face of the mortgage; that it was the first and only mortgage, lien or incumbrance of any kind upon the premises in it described, and that a search purporting to be a search of the premises, and from which, said mortgage appeared to be the only lien and incumbrance, was a true search—affirming personal knowledge of all the statements thus made. Graves testified that Spier said it was a good mortgage on property worth considerably more than the face of the mortgage. That "the mortgage was the only lien on the property. We had considerable talk about it." That "there was no lien on the premises except this mortgage; that it was given for balance of the purchase money." And when the witness inquired of Safford why he had not brought the search, and stated his unwillingness to go on without it, Safford professed personal knowledge of the incumbrances, and said he "knew all about the premises, and that the Walker mortgage was the only incumbrance on the place." That "I need not send for a search, as he knew all about the property, and this was the only lien on the property." Spier said it was the only lien. Spier also produced a search, which purported to be a search of the premises, representing the Walker mortgage as the only lien, and said the search was a true one, and the property was all right." Mrs. Graves testifies that she heard "Safford say it was the first mortgage." That Mr. Graves, her husband and agent, "informed her so also, frequently, and he had charge of this matter from the beginning to the end. Safford said the place had often passed through their office." Levi Safford testifies: "I made representa-

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tions to Mrs. Graves about the Schodac farm, and made them in behalf of Mrs. Spier. They asked me about its value, title and incumbrance. I told them there had been two mortgages, but that Spier said he had paid them off. I was authorized by Mr. Spier to state to Mrs. Graves that the premises were free and clear, except the Walker mortgage, and I did so represent to Mrs. Graves previous to the exchange." It is admitted, and proved in the case, that the representations were false in fact; that there were two mortgages and one judgment, prior liens. It is both admitted and clearly proven, that David S. Spier and Levi Safford were the agents of the defendant to negotiate the mortgage and effect the exchange. It also appears that David S. Spier was the husband of the defendant, and had the general management of her business. She also knew that Safford was negotiating the premises for the mortgage, and that he delivered the mortgage and received the deed for the defendant. The assignment of the mortgage was executed by her, and the deed of the Geneva property delivered to her by Safford. Spier and Safford conducted the business, throughout, in the name of the defendant, and with her knowledge and assent. They were, by virtue of the relation they bore, as well as a matter of fact, the agents of the defendant to effect the exchange. The referee expressly found that both Spier and Safford acted as the duly authorized agents of the defendant in negotiating the mortgage and exchange. The express object of the agency was to purchase the Geneva property for the defendant, and negotiate her mortgage in payment therefor. It follows, then, that whatever statements or representations were made by Spier and Safford during the negotiations with regard to the mortgage, were directly within the scope of their authority to purchase the Geneva property and turn out in payment therefor the Walker mortgage, and were binding upon the principal receiving the fruit.

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It is useless to particularize and refer to emphatic portions of the evidence relating to the representations made. The proof is clear, emphatic and absolutely overwhelming, that the defendant by her agents represented the Walker mortgage to be the first, and only, incumbrance on the premises in Schodac upon which it was a lien; that it was worth more than the face of the Walker mortgage; that the search was true; professing personal knowledge of the statements made. That the defendant, through an unscrupulous agent and husband, with the aid of Safford and a false search, deliberately defrauded, and intended to defraud, Mrs. Graves out of a house and lot, worth more than the price agreed to be paid, by inducing her through willful, false and fraudulent representations to receive a worthless mortgage in payment therefor, is too apparent to admit of a shadow of doubt. But it is claimed that the defendant was ignorant of the fraud perpetrated by her agents at the time of the negotiations. She knew the trade was going on, and what kind of a mortgage she was transferring for this valuable Geneva property. She knew of the existence of the mortgages on the Schodac property, and under the proof it would be exceedingly charitable to concede that she was not an active participant in the fraud; but that after a knowledge of the fraud she retained, and still, by every means at her command, persists in retaining the fruits of this unrighteous transaction, is certain; although the fraud has been fully proven by her own instruments, as well as by other testimony upon which a shadow of suspicion does not and can not rest. And she has utterly failed to controvert it. The object of the tender was to apprise the defendant of the fraud, and give her an opportunity to rescind and restore, or retain and ratify. It is proven by the testimony of George Proudfit, and admitted by the defendant, that she received and retains the fruits. The defendant thereby confirmed and ratified the acts of her agents, and adopted

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the instrumentalities by which the ill gotten gain was obtained.

2. The plaintiff's assignor and agent confided in the representations; this is apparent from the testimony. Upon what else could they rely? They knew nothing of the mortgage, or the property upon which it was a pretended lien. They did not even know that the search was genuine. They relied upon the defendant's representations "that it was a true search." Distant two hundred miles from the records, they were strenuously urged by the defendant's agents to rely upon their statements in respect to the search and incumbrances, and they had a legal right to do so; and it hardly lies with the defendant to question it. Mr. Graves made no inquiry of Mr. Richardson, clerk of the assembly, as to the incumbrances, but simply as to the value. Then again, the inquiry is not whether Mrs. Graves placed her sole reliance upon the representations made. Were they the inducement, without which she or her agent would not have taken the mortgage, or were they the controlling cause? We think it manifest that the representations were the sole inducement; and if there can possibly be any doubt upon the subject, the law settles the question upon the testimony of the plaintiff and wife, who swore that they relied on and confided in the representations. (*Seymour v. Wilson*, 14 N. Y. 567. *Thurston v. Cornell*, 38 id. 287.) The referee expressly found that the plaintiff and Mrs. Graves confided in the representations made, and were thereby induced to exchange and convey her property for the mortgage. The statements of Spier and Safford were of such a positive and definite character that it was only natural for Mrs. Graves to credit them. The claim that because Mr. Graves made inquiry, through the mail, of Richardson, who professed no knowledge of the premises or incumbrances, or as to the value of the premises, Mrs. Graves should lose her right to trust or confide in the

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false representations made, and be denied a recovery, comes with bad grace, and little force, from a wrongdoer who clings to the gains procured by the fraud of a "tricky" man. It remains to be seen, whether the authorities will sustain a recovery founded upon the proof in this action.

II. It is urged that the recovery in this action cannot be sustained for the reason that the defendant was ignorant of the fraud perpetrated by her agents at the time of the transfer; that she did not in person make or authorize any representations, and should not, therefore, be held responsible for the misconduct and fraud of her agents, made without her knowledge. But the defendant received and persists in retaining the fruits and avails of the fraudulent transaction, reaping all the advantages enuring from the fraud of her agents. Spier and Safford were certainly acting within the scope of their authority, which was to effect the exchange, to negotiate the mortgage in payment for the Geneva property. The representations were made for her benefit, and enured exclusively to her advantage. In such cases, the party for whose immediate benefit the representations were made cannot retain the fruits and claim the advantages of the bargain, without adopting the instrumentalities through which it was obtained. This is a familiar and elementary principle of law, and the doctrine is affirmed in numerous and controlling adjudged cases.

We will briefly refer to some of the cases and the terms employed in stating the doctrine. In *Parsons on Contracts*, (vol. 1, p. 62, 2d ed.,) it is laid down, that "a principal is liable for the fraud or misconduct of his agent so far, that on the one hand he cannot take any benefit from any misrepresentation fraudulently made by his agent, although the principal was ignorant and innocent of the fraud; and on the other hand, if the party dealing with the agent suffers from such fraud, the principal is bound to make him compensation for the injury so sustained; and al-

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though the principal be innocent, provided the agent acted in the matter as his agent and distinctly within the line of business intrusted to him." "And though there be no actual fraud on the part of the agent, yet if he makes a false representation as to the matter peculiarly within his own knowledge or that of his principal, and thereby gets a better bargain for his principal, such principal, although innocent, cannot take the benefit of the transaction." (*Ib.*) "If an agent makes false representations inducing purchasers to enter into a contract, the principal is affected by such representations the same as if made by himself." (*Sandford v. Handy*, 23 Wend. 259.) "A principal is liable for the false representations of his agent, made in and about the matter for which he was appointed agent, not on the ground of express authority given to the agent to make the statement, but on the ground that as to the particular matter for which the agent is appointed, he stands in the place of the principal; and whatever he does or says in and about that matter, is the act and declaration of the principal; the principal is just as liable as if he had personally done the act or made the declaration." "The power of the agent to render the principal liable for representations, flows from his mere appointment to do the act or transact the business in and about which the representations are made." (*Sharp v. Mayor of N. Y.*, 40 Barb. 257.) "The vendor of land is responsible for material misrepresentations in respect to its location and quality as made by his agent without express authority, and in the absence of any actual knowledge by either the agent or principal whether the representations were true or false." "One who, without knowledge of its truth or falsity, makes a material misrepresentation, is guilty of fraud as much as if he knew it to be untrue." (*Bennett v. Judson*, 21 N. Y. 238.) "So long as the principal retains the benefits of the dealing, he cannot claim

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immunity on the ground that the fraud was committed by his agent and not by himself. This is an elementary doctrine." (*Ib.*) "The principal cannot enjoy the benefits of a bargain made by an agent without adopting the instrumentalities by which it was consummated." (*Elwell v. Chamberlin*, 31 N. Y. 611.) On page 619 the court says that "if an agent defrauds a person with whom he is dealing, the principal, though not having authorized or participated in the wrong, is nevertheless liable so long as he retains the benefits of the dealing, and while occupying that position, cannot claim immunity for the fraud of his agent." The doctrine of *Bennett v. Judson* is fully sustained and reaffirmed by a unanimous court. "When an agent, acting within the scope of his actual authority, perpetrates a fraud for the benefit of his principal, and the latter receives the fruits of it, he thereby adopts the fraudulent acts of the agent." (*Smith v. Tracy*, 36 N. Y. 79.) "These authorities rest upon the principle that when a party clothes another with authority to speak in his behalf, and indorses him to third persons as worthy of trust and confidence, those who are misled by the falsehood and fraud of the agent, are entitled to impute it to the principal. The latter will not be permitted to retain the fruits of a transaction infected with fraud, whether the deceit which he seeks to turn to his profit was practiced by him or by his accredited agent. In such a case, he cannot separate the legal from the illegal elements of the contract, and appropriate the advantages it secures, while he rejects the corrupt instrumentalities by which they were obtained." (*Ib.*) See also page 84, where the learned judge draws the line and "sharply defines" the distinction between cases of warranty involving the existence and extent of the power of the agent, and cases of fraud of the agent acting within the scope of his authority. Here, again, the Court of Appeals unanimously reaffirm the doctrine of *Bennett v. Judson*, (*supra.*) In *Craig v. Ward*,

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at the next term of the Court of Appeals, that court again fully reaffirmed the doctrine of *Bennett v. Judson*. Judge Hunt, in delivering the opinion, in which the whole court concurred, said: "I concur fully in the propositions laid down at the trial of that case, (referring to *Bennett v. Judson*,) that having received the fruits of the bargain, the defendant was liable for the fraud of his agent, although he did not authorize the statement, or know that it was made, or whether it was true or false." (1 *Pars. on Cont.* 60, 2d ed. *Sandford v. Handy*, 23 *Wend.* 259. *Sharp v. Mayor of N. Y.*, 40 *Barb.* 257. *Bennett v. Judson*, 21 *N. Y.* 238. *Elwell v. Chamberlin*, 31 *id.* 611. *Smith v. Tracy*, 36 *id.* 79. *Craig v. Ward*, 3 *Abb. Pr. N. S.* 235. *Hunter v. Hudson River Iron and Machine Co.*, 20 *Barb.* 494. *Craig v. Ward*, 36 *id.* 377. *Henry v. Root*, 33 *N. Y.* 526. *Fitz Hugh v. Sackett*, *Court of Appeals*, *March*, 1866. *Law Ex. Rep.*, vol. 2, p. 259. *Law Rep. Q. B.* vol. 2, p. 511.)

3. The defendant was liable for the fraud, and an action lies for the damages sustained. The plaintiff's assignor had the election to rescind the contract upon the discovery of the fraud, or affirm it, and claim compensation for the damages sustained. "Action in affirmance of the contract will not affect or preclude a recovery of damages for the fraud." A party may rescind or affirm the contract, and recover damages for the loss sustained by the fraud. (*Van Epps v. Harrison*, 5 *Hill*, 63. *Bradley v. Bosley*, 1 *Barb. Ch.* 125.) "A party does not waive his right to damages for fraud by merely acting in affirmance of the contract, after the discovery of the fraud." "This doctrine has never been questioned." (*Whitney v. Allaire*, 1 *Hill*, 485. *S. C.*, 4 *Denio*, 554; 1 *Comst.* 305.) "Case lies for a false representation, whether made on the sale of real or personal property, and whether it relates to the title or some collateral thing attached to it." (*Oulver v. Avery*, 7 *Wend.* 380.) "An action lies for fraudulent representations as to title and as to incumbrance." (*Whitney v. Allaire*, 1

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Comst. 305. *Ward v. Wiman*, 17 *Wend.* 193. *Clark v. Baird*, 9 *N. Y.* 183, 196, 197. *Haight v. Hayt*, 19 *id.* 464.) The questions involved in the case of *Haight v. Hayt*, (*supra*,) are precisely analagous to those raised herein, and it is quite decisive of the present case upon all the real questions involved, viz., the false representations, the right of the assignor to maintain the action, and the measure of damages. "Every contracting party has an absolute right to rely on an express statement of an existing fact, the truth of which is known to the opposite party and unknown to him, as the base of a mutual agreement." (*Mead v. Bunn*, 32 *N. Y.* 275. *Culver v. Avery*, 7 *Wend.* 380. *Van Epps v. Harrison*, 5 *Hill*, 63. *Bradley v. Bosley*, 1 *Barb. Ch.* 125. *Whitney v. Allaire*, 1 *Hill*, 485. *S. C.* 4 *Denio*, 554; 1 *N. Y.* 305. *Ward v. Wiman*, 7 *Wend.* 193. *Clark v. Baird*, 9 *N. Y.* 183. *Haight v. Hayt*, 19 *id.* 464.)

4. It was claimed upon the trial, and may be urged here, that there is no proof of any fraudulent intent on the part of Spier and Safford, the defendant's agents. That there was no deceit; that the agents acted in good faith, believing that the representations made were true; and the action cannot be maintained for that reason. It seems to us that the proof, to which we have already referred, is so clear and emphatic, the intent to deceive so manifest from the evidence, which is entirely uncontroverted, that the position is untenable, and cannot be seriously entertained by the counsel. They must be presumed to have intended the natural and ordinary consequences resulting from their acts. Spier and Safford both knew of the prior mortgages, previous to making the representations, and there is no evidence that Spier had any reason to believe that they were paid off, and no satisfactory evidence that Safford had reason to believe that they were paid off. Safford's evidence is contradictory, and is fatal to the position in either aspect. They represented and assumed to know the search to be true. Under this proof, it seems

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to us it would be stultifying to suppose that they acted in good faith in making the representations. There was manifest design—deliberate intent to defraud. And such, in effect, is the finding of the referee. It is, however, quite immaterial whether or not Spier and Safford acted in good faith. The representations made by them were material, and were false in fact. The language employed, and positive manner assumed by them, in making the statements, imported personal knowledge of the premises, their value, title, incumbrances, the search and records thereof. They did not state that their information was derived from secondary sources, but asserted personal knowledge thereof. They said to Mrs. Graves, you need not get a search; we know all about the premises and mortgage. We have owned the premises, and they have frequently passed through our hands. In this way they actually induced the plaintiff not to send for a search, or make any further inquiry concerning the mortgage, but to accept their statements as true, and confide in them. False statements made in the positive manner and terms employed by Spier and Safford, professing personal knowledge of their truth, have always been held actionable, by all the authorities. Misrepresentations thus made are held actionable when relating to the solvency of third persons in cases where the party making them derived no personal benefit. The authorities which have sought to restrict the doctrine of the case of *Bennett v. Judson*, (21 N. Y. 238,) do not in the least conflict with the recovery in this action, and would sustain the judgment upon such evidence. (*Marsh v. Falker*, 40 N. Y. 562. *Weed v. Case*, 55 Barb. 535.) In *Marsh v. Falker*, (*supra*,) Judge Daniels, in commenting upon *Bennett v. Judson*, says: "But the agent went beyond the point of representing to the purchaser merely that which he had good reason to believe was the truth. For he made the representations in such a manner, and in such terms, as were calculated to pro-

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duce the conviction in the mind of the purchaser that he had personal knowledge of their truth. That instead of being the result of information derived by him, he had actual knowledge, acquired by ocular inspection and personal examination. That he made the statements on which the purchaser relied upon what he knew, as distinguishable from what he had heard. This was not true, and he himself knew at the time it was not true, and from those circumstances, the intent to deceive the purchaser could very naturally be inferred." So in *Weed v. Case*, Justice Bacon says, in commenting on *Bennett v. Judson*: "The statements on which the purchaser relied, were made in respect to what the party making them assumed to know." Besides, those cases, in the facts and the law applicable thereto, are clearly distinguishable from this, and the court were divided on the questions therein discussed. We submit, then, that the defendant is clearly liable in either view of the case, and our right to sustain this recovery is established by a formidable array of controlling authorities. The exceptions are not well taken, and the motion for a nonsuit was properly denied.

III. It is insisted that there is no proof of damages; and also that the referee erred in admitting and rejecting evidence, and applying the rule of damages. The measure of damages is the difference between the value of the Walker mortgage as it really was, and its value as it would have been had the representations been true. (*Bradley v. Bosley*, 1 Barb. Ch. 125.) This rule has been extended in cases of fraud, and the defendant held chargeable with all the damages resulting from the false representations. (*Whitney v. Allaire*, 1 Comst. 305. *Van Epps v. Harrison*, 5 Hill, 69. *Pitcher v. Livingston*, 4 John. 1; 13 id. 1.) "In cases of covenant, in the absence of fraud, the damages would be the consideration and interest." (*Grant v. Tallman*, 20 N. Y. 191.) "But in cases of fraud, it is agreed on all hands, there must be full indemnity." (*Dim-*

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mick v. Lockwood, 10 *Wend.* 142. *Crouch v. Parker*, 40 *Barb.* 94. *Sharp v. Mayor of New York*, *Id.* 258. *Sedg. on Damages*, 4th ed. 232, 661, and cases cited.) In *Haight v. Hayt*, (19 *N. Y.* 464,) a more liberal rule than the one adopted by the referee in this action was sustained in the Court of Appeals. (*Opinion of Grover, J.*, p. 471; *Denio, J.*, p. 476.) The measure of damages in cases of fraud is the loss sustained by the injured party. There must be indemnity. (*Eli v. Mumford*, 47 *Barb.* 633.) The plaintiff submitted to the referee three theories of computing the damages upon this basis: 1. The Walker mortgage as it was represented, less the amount actually received from it, which was the surplus moneys obtained in 1863 from the foreclosure of the premises in it described, which would leave as a measure of damages, at the date of the referee's report, \$12,238.74. Graves testified that the mortgage when transferred was worthless, and his testimony is uncontroverted. This would leave the damages the full amount of the mortgage, and over \$13,000. 2. The difference between the Walker mortgage at the time of the transfer, and the value of the premises covered by it, over and above the amount of all the prior liens at the same time. The value of the premises at the time of the exchange was \$57.50 per acre. In this view, the measure of the damages would, at the date of the report of the referee, have been \$9734.66. 3. The amount of the incumbrances prior to the Walker mortgage, at the time of the exchange in 1861, with interest to the date of the referee's report, make the measure of damages \$7652.22. The referee adopted the last theory, and reported for the said sum of \$7652.22, for which amount, with costs, judgment was entered. The counsel claimed that the advance realized by Mrs. Graves on a resale of the Schodac farm, purchased by her at the foreclosure sale, should have been deducted from the damages, and that the referee erred in rejecting the proof offered. She purchased the property at a public legal sale,

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and it became absolutely hers. The defendant is no more entitled to have that advance applied in mitigation of damages in this action, than Mrs. Graves or the plaintiff would have been authorized to hold her responsible for the losses, had any ensued. The counsel cited no authorities to sustain this position, and we apprehend none can be found. There is no principle of law warranting such a claim. But the proof establishes that the actual and legal damages sustained by Mrs. Graves, and which the plaintiff as assignee was entitled to recover in this action, greatly exceeded the amount assessed and found by the referee. No injury has been done the defendant, and she has not been prejudiced by the ruling of the referee. If any error was committed by him on the trial it has been entirely cured by the rule of damages finally adopted in the decision of the case. The amount of the recovery is the least warranted by the evidence, in any legal aspect of the case. It came far short of indemnity, and did not exceed in amount the sum actually due and unpaid upon the prior incumbrances; and the premises, at the time of the exchange, did not equal in value the face of the Walker mortgage. This is the rule in cases of covenant, in the absence of fraud. The bond was worthless, and were it otherwise it would be immaterial, as the representations related to the mortgage, and the reliance was upon it. Then again it was for the defendant to show Walker's ability to pay, which they did not and could not do. When it is apparent from the evidence that the complaining party has not been injured or prejudiced by the improper admission or rejection of evidence on the trial, or that the error has subsequently been cured, the judgment will not be reversed for such error. This is well settled. (*Wells v. Cone*, 55 Barb. 585. *Bort v. Smith*, 5 id. 283-285. *Crary v. Sprague*, 12 Wend. 41. *Walker v. Dunsbaugh*, 20 N. Y. 170. *City Bank v. Dearborn*, 20 id. 244.)

IV. The cause of action is assignable; and the excep-

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tions to the decision of the referee in that respect are untenable. The wrong done was an injury to the estate and property of Mrs. Graves, such as would survive to her executors or administrators, under the statute. The following causes of action are assignable under the statute, for torts: Section 1. "For wrongs done to the property, rights or interests of another for which an action might be maintained against the wrongdoer, such action may be brought by the person injured, or after his death, by his executors or administrators against such wrongdoer, and after his death, against his executors or administrators, in the same manner and with like effect, in all respects, as actions founded on contracts." Section 2. "But the preceding section shall not extend to actions for slander, for libel, or to actions of assault and battery, or false imprisonment, nor to actions on the case for injury to the person of the plaintiff, or to the person of the testator or intestate of any executor or administrator." (3 R. S. 746, §§ 1, 2, 5th ed.) The wrong done by the defendant affected the property, rights and interests of Mrs. Graves, and it is not embraced within the exceptions mentioned in the second section of the statute. The case of *Haight v. Hayt*, (19 N. Y. 464,) is decisive of this case. That case involved precisely the same question here raised. On page 468, Judge Grover says: "The exceptions contained in the 2d section manifest the intention of the legislature that all other actions founded on tort should survive." See also, on page 474, the pointed disposition of this question by Denio, J., the same judge who delivered the opinion in *Zabriskie v. Smith*, (13 N. Y. 333,) but where his attention was evidently not called to the statute. He says: "The action survived against the representatives of Hayt, the original defendant. (2 R. S. 447, §§ 1, 2.) The cause of action was a wrong done 'to the rights and interests' of the plaintiffs. The exception in section 2 shows, if there was otherwise any doubt, that the prior section was in-

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tended to embrace this case." To the same effect is *Dininny v. Fay*, (38 Barb. 18,) where JOHNSON, J., in equally strong terms, held that a cause of action in tort, affecting rights and property, was assignable. The criterion is, does the action affect the estate and survive to the executors? (*Haight v. Hayt*, 19 N. Y. 464. *McKee v. Judd*, 12 id. 625, 626. *Richmeyer v. Remsen*, 38 id. 206. *Dininny v. Fay*, 38 Barb. 18. *Johnston v. Bennett*, 5 Abb. Pr., N. S., 331. *The People v. Tioga C. P.*, 19 Wend. 73. *Mackey v. Mackey*, 43 Barb. 58. *Byzbie v. Wood*, 24 N. Y. 607.) The case of *Zabriskie v. Smith* is not authority against us. Nor did Judge Denio intend, in his decision, to hold that cases of this kind were not assignable, as is manifest from his language in *Haight v. Hayt*. His attention was not called to the statute, in *Zabriskie v. Smith*. Indeed no authority is produced by the defendant, sustaining his position. The nearest approach to it is *Borst v. Baldwin*, (30 Barb. 180.) That was a special term decision, was a different case, and turned upon the point that the cause of action for the fraud or wrong was not in fact assigned, and that it did not pass as an incident with the simple assignment of the judgment. Whatever the judge said beyond that, is *obiter*. Then again, it of course cannot stand as authority against the decision of the general term in our own district, and the controlling authority of the Court of Appeals. In this case the assignment is in due form, and is properly executed and stamped. No objection was made to the want of cancellation of the stamps on these assignments. Besides, the cancellation is entirely immaterial. The stamps were duly affixed—put on in good faith before execution of the instruments, as was shown on the trial. The objection is purely frivolous. The want of cancellation would not avoid the instruments. Moreover, the authorities uniformly hold that there must be an intent to defraud the government, or evade the provisions of the law, to invalidate the instrument, and there can be no presumption of

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fraudulent intent. (*Schermerhorn v. Burgess*, 55 Barb. 422. *New Haven Co. v. Quintard*, 6 Abb. Pr., N. S., 128. *Vorebeck v. Roe*, 50 Barb. 302. *Beebe v. Hutton*, 47 id. 187.)

V. It is claimed that this is an action in equity to rescind the contract, and not an action at law to recover damages; and that a recovery for damages cannot be maintained, under the pleadings in this action. The usual allegations necessary to recover damages for fraud and deceit in an action at law are fully set out in the complaint, with unnecessary prolixity. It also appears affirmatively, on the face of the complaint, that numerous acts were done by Mrs. Graves in affirmance of the contract; in short, that she did affirm it, and resorted to every measure under it to realize, after a discovery of the fraud. It also appears upon the face of the complaint, that the defendant had conveyed the premises to one Biggs, and he to several persons, in parcels, and that it was not in the power of the defendant to restore the premises. Also, that the cause of action, and claims for fraud and deceit, for which recovery was sought, were assigned to the plaintiff. That Mrs. Graves was damaged in the sum of the value of the Geneva premises, which loss "and the fruits of said transfer enured entirely to the benefit and advantage of the defendant, who still retains the fruits and benefit derived therefrom." And demands judgment for \$8500, interest and costs. The allegations of a reassignment of the Walker mortgage and judgment, and at the same time apprising the defendant of the fraud, were material to show an affirmance by the defendant of the acts of her agents. It is apparent from other parts of the complaint, that it was not done with a view to rescind. It is manifest, therefore, upon the face of the complaint, that the action is for damages, and could not have been for rescinding the contract; because the allegations, though unnecessarily prolix, were sufficient to sustain a recovery for damages, and insufficient, demurrable and utterly incon-

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sistent with a claim to rescind. The alternative prayer for relief is immaterial. We plead the facts—set out the case at unnecessary fullness, it is true. The defendant was not prejudiced by this. If this were otherwise, and there be doubt about the character of this action, or the formality of the complaint, we are not to be driven out of court for that reason. The proof clearly establishes a cause of action for damages. When an answer is interposed, the prayer for relief becomes entirely immaterial. (*Code*, § 275.) “The case made by the complaint, and the limits of the issue, alone determine the extent of the power of the court” to grant relief. (*Marquat v. Marquat*, 12 N. Y. 341.) The form of the pleadings where an answer is interposed, does not limit the right to give evidence upon the trial, nor impose upon the court any restraint as to the nature or extent of the relief to be given. (*Ib.*) “The very object of the new system of pleading was to enable the court to give judgment according to the facts stated and proved, without reference to the form used, or to the legal conclusions adopted by the pleader.” (*Wright v. Hooker*, 10 N. Y. 59.) “It is sufficient if the facts be stated in the complaint which warrant the judgment, although the grounds upon which the judgment was rendered were other than those evidently contemplated by the pleader.” “This rule is now well settled.” (*N. Y. Ice Co. v. Insurance Co.*, 23 N. Y. 357. *Jones v. Butler*, 20 *How. Pr.* 189.) The distinction between legal and equitable actions is abolished by the Code. (§ 69.) If the facts stated in the complaint, or established upon the trial, entitle us to any relief, either legal or equitable, we are entitled to recover according to the case made. (*Emery v. Pease*, 20 N. Y. 64, 65. *Barlow v. Scott*, 24 *id.* 42.) The complaint may embrace both legal and equitable causes of action; and if the plaintiff fails to establish an action in equity, he may still recover upon any legal cause of action set out in the complaint and established on the

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trial. (*Davis v. Morris*, 36 N. Y. 569. *Hall v. Hall*, 30 How. Pr. 57. *Phillips v. Gorham*, 17 N. Y. 270. *Greason v. Keteltas*, Id. 491. *Catlin v. Gunter*, 11 id. 368.) Besides, by failing to demur or move to strike out and make definite, the defendant waived the objection. (*Code*, subd. 5, § 144. *Youngs v. Seely*, 12 How. Pr. 395. 2 Kern. 336. 10 N. Y. 59. 23 id. 357. 20 How. Pr. 189.) The defendant consented to a reference of this action. This was a clear waiver of the right to trial by jury, claimed in the counsel's points, but not raised on the trial. The recent case of *Bradley v. Aldrich*, (40 N. Y. 504,) we submit is not in conflict with the above authorities on the question of the pleading. That case was commenced and tried as an action in equity, seeking equitable relief only. No damages were alleged or claimed upon the trial. A reference was ordered, to assess damages not asked for, and judgment ordered thereon. Judge Woodruff, in his opinion, page 509, says: "It does not appear that the plaintiff at any time treated the action as brought to recover damages. No such idea could be suggested by the complaint. No such claim appears to have been made on the trial." At page 511, the learned judge concedes that legal and equitable actions may be united in the same complaint, and that by consent to refer the defendant waived a trial by jury.

VI. Numerous exceptions were taken by the defendant to the decision of the referee. Those embracing the principal questions raised on the trial have heretofore been adverted to. We will only refer, cursorily, to some remaining unconsidered, and seemingly unimportant. 1. It was no error in the referee not finding that the search was in the same condition when shown to the plaintiff's assignor, as when made by the clerk of Rensselaer county. A referee cannot be required to find any further findings of fact than such as enter into and form a basis of the judgment. Facts not found are necessarily negated by

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implication. (*Sermont v. Baetjer*, 49 Barb. 362. *Nelson v. Ingersoll*, 27 How. Pr. 1.) There is no proof to warrant such a finding. No evidence was adduced that the search was made and executed by the clerk. Safford testified that he did not know whether the signature to it was genuine. The proofs fully establish it to have been false and untrue, as the referee has found. And the defendant has not excepted to the finding. The search was last in the possession of Spier. Efforts have been made to find it. They were unavailable. 2. Mrs. Graves relied upon the search, and it is apparent that she based such reliance upon Spier's representation that it was a true search. She confided and trusted in his statements made about the search, personally, and also through her agent, and had no other means of information of the genuineness of the search. Spier represented the search to be true. He, by those representations, induced Mr. Graves to believe it to be true, who communicated that belief to Mrs. Graves, and Safford conveyed the same representations of Spier to her. She relied upon a false search which Spier represented to her as a true one. Her husband and agent relied on Spier's representations. 3. It is entirely immaterial whether the bond accompanying the Walker mortgage was worthless at the time of the exchange, inasmuch as the representations made were respecting the mortgage. Nothing was said during the negotiations, about the bond. It was at no time asserted or claimed that Walker was solvent, or able to pay his bond. Besides, Graves swore the bond was then entirely worthless, and this testimony is not controverted. It is also admitted that judgment was obtained against him, execution issued, and returned wholly unsatisfied. 4. The defendant's exception respecting the Van Hoesen judgment is not well taken; because, (a.) The ground of the exception is that the referee found as a fact, that the Walker judgment was a prior lien to the Walker mortgage. This is not true in point of fact,

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and the exception fails. (b.) The referee has not found that the judgment was a prior lien, but that it was a lien upon the premises, which was true in point of fact. (c.) The representations were that the Walker mortgage was the only lien upon the premises. (d.) This judgment is only material upon the question of damages, and it has already been shown that the defendant has not been injured by the rule adopted by the referee. This lien may have injured the plaintiff, and in a case of fraud it does not lie in the mouth of the wrongdoer to speculate on niceties. This exception is technical.

JOHNSON, J. The appellant's counsel claims that the complaint in this action is for equitable relief only—to have the contract between the defendant and the plaintiff's assignor rescinded on account of the alleged fraud, and the property assigned and conveyed in pursuance of such fraudulent contract, restored, and the parties placed in *statu quo*. But I am of the opinion that the action was properly treated by the referee, and tried, as an action at law, to recover damages for an alleged fraud. The facts stated in the complaint constitute such a cause of action, and the prayer for relief demands a judgment for damages in a specified amount. It is true that after the prayer for judgment for the amount of the bond and mortgage received from the defendant, there is also a prayer for relief in the alternative, "or that the defendant be adjudged to reconvey the premises," and to account for the use, income and profits since the conveyance, or for other relief. But the prayer for relief is no part of the cause of action, and does not determine the character of the action. The nature of the action, and the cause of action, are shown by the facts stated. It is shown, by the facts stated, that the plaintiff could not have the alternative relief demanded, for it is there alleged that the defendant, long before the commencement of the action, had conveyed

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the premises, and that her grantee had divided them and conveyed them, in different parcels, to sundry other persons. And this is admitted by the answer. No cause of action, therefore, which could entitle the plaintiff to that relief, is stated in the complaint, and it must be held to be an action at law to recover the damages sustained by reason of the fraud in making the contract. There are many statements in the complaint which are wholly unnecessary to such a cause of action, but they must be regarded as mere surplusage, which works no injury after issue is taken upon the complaint, and the parties go to trial. They must try the issues made by their pleadings, if they are material.

The most important question in the case, as it strikes me, is, whether such a cause of action is assignable, so that an assignee can maintain an action upon it. As the decisions in this State stand, it may, perhaps, be regarded as somewhat doubtful. In *Zabriskie v. Smith*, (13 N. Y. 322,) it was held, expressly, that a right of action caused by a false and fraudulent representation of the solvency of a vendee of merchandise was not assignable. Such a right of action, it was there held, would not survive to the personal representatives of the party defrauded, and therefore could not be assigned *inter vivos*. It was conceded, however, that any right of action which would survive to the personal representatives of the party defrauded, might be assigned by such party, and an action maintained thereon by the assignee.

In that case, as is seen, the fraud did not relate to any distinct and specific property, and no property was directly affected by it. It related to the credit and trustworthiness of a third person. There was, it is true, resulting damage to the plaintiff, but this was not the immediate or necessary consequence of the fraud; it was rather secondary and incidental. And the decision seems to have been placed expressly upon the ground that it

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belonged to that class of injuries which consisted entirely of the personal suffering, either bodily, or mental, of the party defrauded, and which did not affect his property, and therefore the cause of action would die with him, and could not pass by assignment. In *Haight v. Hayt*, (19 N. Y. 464,) which was an action brought by the purchaser of a farm, against executors of the vendor, for a fraud practiced in the sale thereof, by their testator, in making false and fraudulent representations at the sale, in regard to an incumbrance thereon, it was held distinctly that such a cause of action survived against the personal representatives of the party practicing the fraud. Denio, J., who delivered the opinion in *Zabriskie v. Smith*, (*supra*,) in his opinion in the case then under consideration, says: "The action survived against the representatives of Hayt, the original defendant. The cause of action was a 'wrong done,' 'to the rights and interests' of the plaintiff." And he cites 2 R. S. 447, §§ 1, 2, and then says: "The exception in section 2 shows, if there was otherwise any doubt, that the prior section was intended to embrace this case." This is an express authority for the proposition that a cause of action for a fraud like the one in question, survives to, and against, personal representatives of a deceased party to the transaction, and is therefore assignable. Indeed, the statute would seem to place the question of the continuance of such a cause of action beyond all doubt. By section 1, the right of action is expressly given to, and against, executors and administrators "for wrongs done to the property, rights and interests of another, for which an action might be maintained against the wrongdoer." The action here does not fall within the exception made by section 2 of the statute.

In *Byrnie v. Wood*, (24 N. Y. 607,) which was an action brought by an assignee, to recover back moneys fraudulently obtained from the assignor by the defendant, by

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fraudulent representations to such assignor, in respect to the cost of a certain vessel, the case of *Zabriskie v. Smith* is commented upon, and the distinction between that case and the one then before the court pointed out, and the judge who delivers the opinion goes further, and says: "It may be advisable to see how fully" the decisions in the cases of *Zabriskie v. Smith*, (*supra*,) and *Allen v. Addington*, (7 *Wend.* 9,) "accord with the Revised Statutes." The learned judge also expresses the opinion that if the tort was one of the elements that went to make up the cause of action, in the case then before the court, it was assignable. But the court did not pass upon that question, holding that the action was maintainable as for money had and received. It has long been held that a right of action for the conversion of personal chattels might be assigned, so as to enable the assignee to maintain the action. (*McKee v. Judd*, 12 *N. Y.* 622. *Gillet v. Fairchild*, 4 *Denio*, 80. *Hudson v. Plets*, 11 *Paige*, 180.) It is quite difficult to see why a cause of action growing out of a fraud, practiced by one upon another in the exchange or sale of property, by which the defrauded party loses his property, and which is a species of tort, is not also assignable. All the cases agree that it is assignable if the cause of action survives, and may be maintained by or against the personal representative of the parties to the transaction. We have seen that a cause of action like the one before us does so survive. This case is not like that of *Zabriskie v. Smith* in its facts, but is like that of *Haight v. Hagt*. I conclude, therefore, that the action is maintainable by the plaintiff as assignee.

There can be no question, at this day, that the defendant is liable for the fraud of her husband, who made the bargain for her as her agent, although she was wholly ignorant of the fraud so practiced, and did not authorize it. She had the fruits of the bargain. She kept the property bargained for, and sold it, and retains the proceeds.

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She must be held, therefore, to have made the instrumentalities by which the property was procured her own. The law will impute the wrong to her under such circumstances, as it was done for her benefit, and she retains the advantage. (*Bennett v. Judson*, 21 N. Y. 238. *Elwell v. Chamberlin*, 31 id. 611. *Smith v. Tracy*, 36 id. 79.)

The referee finds that the defendant's husband and agent, at the time he made the representations, knew them to be false. That they were material is quite apparent, and it is proved, and found, that the plaintiff's assignor relied upon the representations. Indeed it could, in the nature of things, scarcely be otherwise, in such a case.

The appellant's counsel contends that the finding of the referee is against the evidence, but the most careful examination of the case will show that the finding is entirely justified by the evidence.

The appellant has no reason to complain of the rule adopted by the referee in measuring the damages. What the plaintiff was entitled to, was the difference between the value of the mortgage debt as it would have been had the mortgaged premises been free from all prior incumbrances, as represented, and its value as it turned out to be, with the mortgaged premises incumbered by two prior mortgages and a judgment, amounting in all to \$4760.72, on the day the bargain was made. The two prior mortgages were foreclosed by action, and the premises sold in satisfaction thereof within less than two years after the bargain between the defendant and the plaintiff's assignor was made. On that sale the premises were struck off to the plaintiff's assignor, who was the highest bidder, for \$6000. This, it will be seen, after satisfying the mortgage debts and costs, left a small amount to apply on the bond and mortgage of the plaintiff's assignor. The plaintiff testifies that this amount was about \$1100. The referee finds

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that had the premises been unincumbered by any previous incumbrances, as represented, the bond and mortgage would have been worth the full face thereof, \$8852.03. After this foreclosure and sale of the mortgaged premises, the plaintiff's assignor brought an action on the bond which accompanied the mortgage, against the obligor, and obtained judgment; but the execution on the judgment was returned wholly unsatisfied. I do not see why the plaintiff, under such circumstances, was not entitled to recover the whole amount of the mortgage debt, over and above the surplus arising upon the sale, with interest on that balance, by way of damages. The plaintiff's assignor realized nothing upon, or by reason of, her mortgage debt, except this surplus. She bought the premises, it is true, at the foreclosure sale, but she took them as any other purchaser would, not because of her mortgage, or by means of it, but by a higher and hostile right. By means of her mortgage she got this surplus, and nothing more; and this was in effect a judicial determination that her mortgage, as an incumbrance, was worth no more. But the referee adopted a rule vastly more favorable to the defendant, giving her, as it would seem, the benefit of the purchase of the plaintiff's assignor, and charging her only with the amount which the defrauded party had to pay to get a title from another, and a hostile source. Certainly the defendant ought not to complain of the amount of damages. The assignment of the cause of action was properly admitted in evidence, and the appellant's counsel makes no point upon it.

The other assignments introduced in evidence were not void because the stamps thereon were not canceled. There is no evidence or room for pretense that they were left uncanceled for the purpose of defrauding the government. No question can arise here in regard to the mode in which the action was tried. The reference was by consent, and

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it was tried without objection that it was not a referable action.

The judgment must therefore be affirmed.

MULLIN, P. J., concurred.

TALCOTT, J., also concurred, except as to the rule of damages suggested in the above opinion. In regard to that, his opinion was, that damages should have been estimated upon the basis of the redemption of the mortgaged premises, by the plaintiff's assignor, from the incumbrance of the prior mortgages, and the plaintiff allowed, by way of damages, what was necessarily paid by his assignor, to remove prior incumbrances, and make her mortgage the first lien, as it was represented, and interest thereon.

Judgment affirmed.

[FOURTH DEPARTMENT GENERAL TERM, at Syracuse, November 14, 1870.
Mullin, P. J., and Johnson and Talcott, Justices.]

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JOHN C. BRIGGS vs. NORMAN MERRILL.

Where, in the course of a trial at the circuit, the defendant objects to evidence offered by the plaintiff, and excepts to the ruling of the justice, admitting it, it is erroneous to order a verdict in favor of the plaintiff, subject to the opinion of the court, as the defendant is thereby deprived of the opportunity of having his exceptions considered.

Such a ruling, under such circumstances, is a mistrial; and a new trial should be ordered, on account of the error, unless the exceptions are waived by the defendant.

If the plaintiff moves for judgment on the verdict, submitting his case and points without argument, and the defendant opposes the motion wholly upon the merits, by submitting, without argument, his points, in which no reference whatever is made to the exceptions taken upon the trial, the latter will be deemed to have waived his exceptions taken at the trial, and consented that the court might decide the motion upon the merits, irrespective of his exceptions.

Neither the payee, nor any holder, of a promissory note given in part perform-

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ance of a fraudulent bargain, who is not an innocent, *bona fide* holder for value, before it becomes due, can enforce its collection, against the maker. If a note be given for the price of property purchased in fraud of the payee's creditors, the law will not aid in carrying out any portion of the fraudulent bargain upon which it was given, but will leave all the parties who are chargeable with notice, to rely upon the option of the maker for the performance of the apparent obligation.

A receiver does not stand in the situation of an innocent, *bona fide* holder for value. He acquires title by legal process, and not in the regular course of dealing in commercial paper.

A note, being of no legal value, as against the maker, in the hands of a receiver, or a judgment creditor of the payees, the taking of it by such creditor, upon supplementary proceedings against the payees, for the purpose of having it applied to the satisfaction of his judgment, cannot operate in law as a ratification or sanction of the bargain upon which the note was given; or estop such creditor from insisting that the bargain was void as to him, by reason of the fraud in which it was conceived and carried out, and that the maker acquired no title to the property for the purchase money of which it was given, as against the claims of such creditor.

A judgment creditor may take a promissory note given by a third person to his debtor, by virtue of his execution or proceedings supplementary, without thereby relinquishing his right to take property of the debtor, for the purchase money of which the note was given.

MOTION for judgment upon a verdict in favor of the plaintiff, taken subject to the opinion of the court. The facts are sufficiently set forth in the opinion of the court.

S. S. Morgan, for the plaintiff.

I. The taking of the note by Merrill and procuring the order of the court that it should be applied to the payment of Merrill's debt was a ratification by Merrill of the sale of the wagon and harness. When a party with full knowledge of all the facts affirms a contract, he is estopped from afterwards disaffirming it. (*Bronson v. Wiman*, 10 Barb. 407.) The receiver did not take the note in the ordinary course of receivership. On the contrary, Merrill made a special application to the court that this note should be taken by the receiver and applied to the payment of Merrill's debt.

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II. Suppose Merrill had stood by at the sale of the wagon and harness by Alexander M. to John C. Briggs, and upon Alexander M. Briggs taking the \$100 note, Merrill had received it from Alexander M., and agreed to apply it on his (Merrill's) demand; could Merrill afterwards question the sale from Alexander M. to John C.? If he could not, then clearly he cannot in this case; for with full knowledge of the sale and the purpose for which the note was given he did take the note and apply it on his debt. Merrill having taken the note with full knowledge of the consideration for which it was given, is estopped from questioning the validity of the sale of the wagon and harness; by his own act he has ratified the sale of the property to John C. (*Lawrence v. Taylor*, 5 *Hill*, 107. *Murray v. Bininger*, 3 *Keyes*, 107.)

III. A creditor, by accepting a dividend under an assignment, is estopped from questioning the validity of the assignment. (*See opinion of Nelson, J., in Allen v. Roosevelt*, 14 *Wend.* 100.) A party taking under a will is estopped from denying its validity. (*Jackson v. Thompson*, 6 *Cowen*, 178.)

IV. If a party stands by and sees another sell goods and treat them as his own, without interposing his objection and title, he is estopped from making claim to the goods, thereafter. So if A. sells goods belonging to B. and that without the knowledge or consent of B., yet if B. after being informed of the circumstances of the sale, accepts the amount or any part of the consideration of the sale, he is estopped from repudiating the sale. (*Tilton v. Nelson*, 27 *Barb.* 595. *Dezell v. Odell*, 3 *Hill*, 215.) Where a wife has, after the termination of coverture, recognized the validity of a sale upon a mortgage foreclosure, and accepted the surplus money arising upon the sale, she is estopped from denying the validity of the foreclosure. (*Tilton v. Nelson*, 27 *Barb.* 595.) Under such circumstances the party is concluded from denying what his own

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conduct has asserted, or from interfering in any way with titles which he is estopped to controvert. (*Ib.*) It frequently occurs that an estoppel cannot be pleaded. (*Welland Canal Co. v. Hathaway*, 8 *Wend.* 480.) It has been decided that a judgment need not be pleaded by way of estoppel, but may be given in evidence, as well as pleaded in bar, under the general issue. (*Wood v. Jackson*, 8 *Wend.* 9. *Dunkle v. Wiles*, 6 *Barb.* 515.) If the defendant in this action erred or was mistaken in his rights under the proceedings supplemental to execution, he has no remedy. A party cannot reap advantage from his own mistakes. (*Dewey v. Bordwell*, 9 *Wend.* 65.) As the case now stands, the defendant in this action has the note which was given for the wagon and harness, and he has the wagon and harness also. In the language of Judge MULLIN, "the defendant cannot keep both wagon and note." Yet he has both, and does not offer to return either, claiming to be entitled to both.

The plaintiff should have judgment upon the verdict.

Geo. W. Smith, for the defendant.

I. The plaintiff's right to recover in this action rests upon the facts as they existed at the commencement of this suit. He cannot avail himself of a title arising afterwards, except by a supplemental pleading. 1. The sale of the property was lawful when made, and the defendant pursued only his legal remedy. A proceeding lawful when it is taken, cannot be made wrongful by matter *ex post facto*. 2. If the defendant was right in making the levy and sale, which the finding of the judge assumes, then there was no wrongful taking or conversion; and how could the subsequent obtaining and application of the note of itself make the taking wrongful? 3. The plaintiff, to recover, was obliged to prove the wrongful taking and conversion, alleged in the complaint. In this he entirely fails. There is a failure to prove the complaint, in its en-

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tire scope and meaning. 4. A recovery in this case must be founded upon the idea that the fraudulent purchaser of property may maintain an action against one taking it by virtue of a lawful lien, provided the latter subsequently comes, even in some other proceeding, to the possession of the consideration paid by the fraudulent purchaser. It is submitted, that the fact of obtaining such consideration in this way, has no legal bearing upon the case. 5. The note was void in the hands of the judgment debtors, and it was also void in the hands of the receiver, since he only took their title and rights. In point of law, the defendant takes no benefit from the note. (*Nellis v. Clark*, 20 Wend. 24. S. C., 4 Hill, 424.)

II. Equity will not shield a fraudulent actor from the consequences of his own illegal conduct. A party may in many cases lose the fruits of an unlawful enterprise, and yet remain liable on obligations incurred in its prosecution. That the plaintiff should lose the property that he attempted unlawfully to withdraw from the reach of the defendant's execution, while his note may also be enforced by a bona fide holder, is simply the decree of the law which pronounces his purchase fraudulent and void. 1. If equity could relieve in any case of this kind, it would not do so at the risk of injuring another party. Nothing but the actual payment of the note could induce the court to set it off against the legal interest acquired under the levy on the goods. Otherwise, the judgment creditor might lose his lien, be charged with costs for making a lawful levy, and yet realize nothing from the note. In fact the defendant has received nothing on his judgment, except the proceeds of the sale of the wagon and harness. 2. Granting that the law would not compel the plaintiff to pay this note, or that having seized the consideration of the note, the defendant could be restrained from proceeding to collect it, then it is not against the note that the plaintiff must seek relief, but against the levy and sale

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of the goods. But the court will not intervene to protect a party in the possession of the fruits of his frauds, or of his violations of the law. If the note is valid, the defendant may avail himself of it by as clear an equity as could any other creditor. The plaintiff thereby suffers no greater loss, and the defendant receives only his just demand. 3. It would be highly inequitable to subject the defendant to costs, and deprive him of the interests he had acquired by a regular levy and sale of the goods. In effect, this judgment would work a forfeiture to this extent, as a penalty for appropriating this note. And yet it was not against legal conscience for the defendant to avail himself of a remedy given by the law. He gets only the amount due on the judgment. That the plaintiff is thus made to pay a portion of the judgment against his fraudulent confederates is not the fault of the defendant, but the just operation and necessary rigor of the law. 4. Should this judgment be supported, the defendant may be imprisoned upon it, not for a wrongful taking and conversion of the plaintiff's property, for that is not pretended, but in effect because of his obtaining the application of this note upon his judgment by a judicial order. 5. When the plaintiff issued this note, he exposed himself to the danger of losing the consideration, and also of being compelled to pay the note. It is of no legal moment that both of these legal consequences are enforced against him by the same person.

III. No principle of ratification can apply to this case. Frauds and violations of the law cannot be aided by any sort of adoption. They are incapable of ratification. A principal may ratify a lawful act, done without authority, or adopt a transaction which he is not bound to recognize; but there must be some privity or relation between the ratifying party and the actor, or subject matter. Here the defendant had no connection with the sale to the plaintiff, and was in no way affected by it. He took the property as

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if no sale had been attempted. No proceeding on his part against other parties could work a ratification, by the defendant, of that sale. The law fixed its character, and no act of any party could change it. Here the defendant has done nothing in the nature of a ratification or waiver of the fraud. On the contrary, his levy ignored and repudiated the illegal sale.

IV. The law works a practical forfeiture against the fraudulent purchaser. He loses what he pays. Unless the fraudulent purchaser suffers this loss, there is no restraint on frauds of this kind. In this case the plaintiff recovers the value of the property, paying only his note, if anything, while the defendant is mulcted in costs for pursuing strictly legal remedies.

V. We submit that the defendant was not called on to repudiate the note, and could not. It necessarily passed to the receiver, along with the other property of the defendant. The creditors were entitled to it. The provision about applying the note, added nothing to the legal effect of the assignment to the receiver, nor was it at all material that it was to be applied upon the judgment due the defendant, instead of the demand of some other creditor.

VI. The defendant cannot be estopped from setting up the defense of fraudulent sale. It was a fraud practiced against him, not one in which he had any participation. Estoppels must be equitable. They will not be raised to shield a fraudulent wrongdoer.

VII. Fraud in the sale from the judgment debtors to the plaintiff was apparent in the design to hinder and delay creditors, and in the transfer of partnership property from an insolvent firm to a purchaser for the consideration, in part, of an antecedent debt due him from one of the partners, and in part on a long credit. (*Ransom v. Van Deventer*, 41 Barb. 307. *Wilson v. Robertson*, 21 N. Y. 587. *Browning v. Hart*, 6 Barb. 91.)

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JOHNSON, J. This is a motion for a judgment upon a verdict in favor of the plaintiff, ordered by the justice at the circuit, subject to the opinion of the court at general term. In the course of the trial, the defendant objected to certain evidence offered by the plaintiff, and excepted to the ruling of the justice admitting it. He also excepted to the ruling and decision ordering a verdict in the plaintiff's favor, subject to the opinion of this court. In this condition of things it was erroneous to order a verdict subject to the opinion of the court, as the defendant is thereby deprived of the opportunity of having his exceptions considered. Such a ruling, under such circumstances, is a mistrial, and a new trial should be ordered on account of the error, unless the exceptions are waived by the defendant. The plaintiff moves for judgment on his verdict, submitting the case and his points without argument. The defendant opposes the motion by submitting his points, without argument. In his points, no reference whatever is made to the exceptions upon the trial, but the motion is opposed wholly upon the merits. This being the case, the defendant must be deemed to have waived his exceptions taken at the trial, and consented that the court might decide the motion upon the merits, irrespective of his exceptions.

The case upon the facts is, I think, novel and quite peculiar. The action was for the wrongful taking and conversion by the defendant, of the plaintiff's property. The defendant justified the taking, by virtue of an execution issued upon a judgment in his favor for \$111.10, in a justice's court, against Henry S. Briggs and Alexander M. Briggs, two brothers of the plaintiff. The property was sold by the constable, and bid in by the defendant at such sale. It appeared in evidence that the property in question had been the property of H. S. and A. M. Briggs, and that they sold it to the plaintiff after the action in the justice's court had been commenced against them by the

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defendant. On this sale and purchase between the plaintiff and his brothers, the plaintiff turned out as part of the purchase price, a promissory note for \$50, which he held against Henry S. Briggs, and which he had held for about two years. For the balance of the purchase price, which was \$100, he gave his promissory note, payable eight months from date. The defendant claimed that this sale and purchase by the plaintiff, of the property in question, was made for the purpose of hindering, delaying and defrauding the creditors of H. S. and A. M. Briggs, and gave evidence tending to show that such was the case; showing, among other things, that about the time the action was commenced in the justice's court, they turned out all the property they then had and owned to their father, except the wagon and harness in question, which the plaintiff bought after the action was commenced; and that they were in failing and insolvent circumstances at the time. Other facts and circumstances were shown, tending to establish the fraudulent character of the transaction. The constable's sale of the property in question was on the 23d of March, and this action was commenced soon thereafter. The complaint was verified by the plaintiff March 31, 1868. The sale by the constable satisfied the defendant's judgment in part only. After the sale, and after this action had been commenced, the defendant undertook, by proceedings supplementary to execution, to discover other property belonging to the defendants in that judgment, which he might have applied in satisfaction of the balance due thereon. On those proceedings, the defendants were examined, and the plaintiff's note of \$100, given on the purchase of the property in question, was discovered in their possession. The referee appointed by the county judge, in the supplementary proceedings, reported the discovery of this note to such judge, on the 10th of April, 1868, and on the same day the judge made an order requiring the referee to keep such note and deliver it over to the

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receiver to be thereafter appointed, to be applied in satisfaction of the defendant's judgment. A receiver was appointed in those proceedings on the 17th of April following. The same person who had been appointed referee, was appointed receiver, and had the note in his possession upon this trial. So far as appears, nothing had been done with the note, by the receiver, at the time of the trial. The value of the wagon and harness in question was agreed upon by the parties at \$166. Upon this state of facts, the justice, at the circuit, held and ruled that the defendant could not keep both the wagon and harness and the note. That by taking the note, given upon the purchase of the property by the plaintiff, by virtue of his proceedings supplementary to execution, for the purpose of having it applied to the satisfaction of the judgment, the defendant had ratified the plaintiff's purchase, and affirmed its validity, he knowing at the time such note was discovered by the referee, that it was given in part payment of the property in question; and ordered the jury to find a verdict for the plaintiff for the value of the property as agreed upon, subject to the opinion of the court at general term.

This ruling at the circuit proceeded, necessarily, upon the assumption that the purchase of the property by the plaintiff had been shown to be fraudulent and void as against the creditors of H. S., and A. M. Briggs, but that the defendant by taking the note given for the purchase price, in the subsequent legal proceedings, had thereby ratified and sanctioned the plaintiff's purchase, and precluded himself from insisting upon the fraudulent character of such purchase as a defense to the action. This motion for judgment by the plaintiff proceeds, also, upon the same assumption. This ruling, and direction of the learned justice at the circuit, was clearly erroneous. It is impossible to make the taking of that note by legal process operate as a ratification by the defendant of that fraudulent sale and purchase, and an admission of its validity, or a

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waiver of the fraud. The trade as between the plaintiff and his brothers, the judgment debtors, was a valid transaction. As between them, the title to the wagon and harness vested in the plaintiff, and the note belonged to the debtors. But the note having been given in part performance of a bargain entered into for the purpose of defrauding the creditors of the vendors of the property in question, its collection could not be enforced by the receiver, or by the defendant. It was still an executory part of that fraudulent arrangement, and the law will not assist in its enforcement. This was expressly held in *Nellis v. Clark*, (20 *Wend.* 24,) which decision was affirmed in the Court of Appeals. (4 *Hill*, 424.) The principle established is that neither the payee nor any holder, who is not an innocent *bona fide* holder for value, before the note becomes due, can enforce its collection, against the maker. The law will not aid in carrying out any portion of the fraudulent bargain, but will leave all the parties who are chargeable with notice, to rely upon the option of the maker for the performance of the apparent obligation. The receiver does not stand in the situation of an innocent *bona fide* holder for value. He acquires title by legal process, and not in the regular course of dealing in commercial paper. Neither the receiver nor the defendant, for whose benefit the note was sought to be obtained, paid any value for it. The note being of no legal value, as against the maker, in the hands of the receiver, or of the defendant, could not operate in law as a ratification or sanction of the bargain upon which it was given, or estop the defendant in this action from insisting that the bargain was void as to him, by reason of the fraud in which it was conceived and carried out, and that the plaintiff acquired no title to the property, as against his claims as judgment creditor of the vendors. But even had the note been a valid security, and collectable in the hands of the receiver, the discovery and delivery of it into his hands,

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could not by any possibility, in my judgment, have produced the legal results adjudged by the ruling at the circuit. Had it been a chose in possession, instead of a chose in action, I do not see why the defendant might not have taken it by virtue of his execution or proceedings supplementary, without relinquishing his right to take the property in question. As between the parties to that bargain, the trade would have been good as against all the world except the creditors of one of the contracting parties. As between themselves, each would have acquired a complete and perfect title to the property received by him in the transaction, as against the other. But as regards a creditor of one of the parties, the title of him who takes from the debtor does not vest, as against such creditor, and the creditor may levy upon the property and contest the title. The transaction is void as to creditors, and the title still remains in the debtor as to them. The creditor may therefore take it in satisfaction of his debt by regular process, as has always been held, if he can establish the fraud. As to the property which the debtor receives from the other party to the fraudulent contract or exchange, it is his to all intents and purposes, as against the other party and all the world. The other party to the transaction could never reclaim it by any legal proceeding, as the law would afford him no aid, and would not hear him allege that he had parted with it to aid in defrauding another. In every such case the party bargaining with a debtor, with such intent, does it at the peril of having that which he receives taken from him by the creditors of the debtor whom he is attempting to defraud, without having any remedy to recover what he parts with in carrying out the bargain. The law will leave him in the snare his own devices have laid. The property thus received by the debtor being his exclusively, the law devotes it to the payment of his debts, whenever it can be reached by legal proceedings on the part of his creditors. The law will not allow

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him to retain it, and use it, in defiance of his creditors, because he acquired it by a fraudulent attempt to deprive them of their rights. It gives no such aid and comfort, or protection, to any party to a transaction entered into for such a purpose.

It follows that the motion for judgment in the plaintiff's favor, upon the verdict, must be denied, and judgment ordered for the defendant for his costs of the action.

TALCOTT, J., concurred.

MULLIN, P. J., did not sit; the action having been tried before him, at the circuit.

[FOURTH DEPARTMENT, GENERAL TERM, at Syracuse, November 14, 1870.
Johnson and Talcott, Justices.]

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ALEXANDER GUTCHESS vs. GEORGE B. DANIELS and JAMES
C. DANIELS.

The statute of set-off proceeds upon the equitable principle of not allowing one party to recover, from another, money due, while at the same time he withholds from such other that which is legally and equitably due from himself.

In every case where there is a good cause of action, and also a valid claim which is the subject of set off, in the hands of the defendant, there is a mutual violation of the obligation to pay.

An agreement by commission merchants to sell grain to be shipped to them by another firm; to apply one half of the net proceeds of the sales upon a prior indebtedness of the consignors; and that the other half shall be paid over to the latter, *and not otherwise applied*, is not binding upon the consignees, so as to deprive them of their legal right to set off the prior indebtedness, against the demand of the consignors in the hands of an assignee.

APPPEAL from a judgment entered upon the report of a referee.

The action was brought to recover the sum of \$748.72, one half the net profits due and belonging to the firm of

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Gutchess & Yawger, from the defendants, on a boat load of wheat consigned to the defendants and sold by them, in 1867, which claim was assigned to the plaintiff on the 22d of November, 1867.

The referee found the following facts : That during the year 1867, and up to the time of the commencement of this action, Ira B. Gutchess and John P. Yawger were copartners in business at Port Byron, Cayuga county, in buying grain and produce and shipping the same to the New York market, and to other places, under the name and firm of "Gutchess & Yawger." That during the same year, 1867, and up to the time of the commencement of this action, the defendants herein were copartners in business in the city of New York, under the name and firm style of "G. B. & J. C. Daniels," as general produce and commission merchants. That prior to the month of July, 1867, the said Gutchess & Yawger had consigned grain and produce to the defendants at the city of New York, and the defendants had sold the same and paid drafts upon them drawn by Gutchess & Yawger, and had advanced large amounts of money to said Gutchess & Yawger, more than the net proceeds of the grain and produce so consigned to them. That on the 17th day of December, 1866, the said Gutchess & Yawger were indebted unto the defendants in this action in the sum of \$4403.81, on account of their acceptances and advances to said Gutchess & Yawger. That on the 29th day of July, 1867, the said Gutchess & Yawger agreed and contracted with the defendants that they, the said Gutchess & Yawger, should purchase grain at Port Byron, and at other places in western New York, and ship and consign the same to the defendants at New York city, and that said Gutchess & Yawger should draw drafts upon the defendants for money to pay for said grain, or the liabilities incurred in the purchase thereof, when the same should be shipped and consigned to the defendants. That

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the said Gutchess & Yawger also agreed to place, and did place, in the hands of the defendants, certain promissory notes to the amount of \$5000, which said notes were to be held by the defendants as collateral security for any losses that might occur in this transaction with said Gutchess & Yawger in the purchase and sale of the said grain. That the defendants agreed to accept the said drafts to be drawn by Gutchess & Yawger upon them for the moneys expended in the purchase of said grain, and to pay said drafts, and to accept said grain and produce at their place of business in the city of New York, on the arrival thereof, and to sell the same for Gutchess & Yawger for their usual commission. That it was also agreed by and between the said Gutchess & Yawger and the defendants, that the latter should apply one half of the net profits arising from the purchase and sale of said grain, to the payment of the indebtedness herein before mentioned of said Gutchess & Yawger to the defendants, and the other half of the said net profits were to be paid by the defendants to the said Gutchess & Yawger, and not to be otherwise applied by the defendants. That under said agreement Gutchess & Yawger, in the month of August, 1867, purchased a cargo of wheat containing 7236 bushels and 58 pounds, and shipped the same upon the canal boat "*Garrison*," and consigned the same to the defendants in this action, at the city of New York. That the defendants received the said cargo of wheat, and on the 21st day of August, 1867, sold the same for and on account of the said Gutchess & Yawger, and that the net profits thereon, over and above all charges, commissions and deductions entitled to be made therefrom, amounted to the sum of \$1497.44. That on the said 21st day of August, 1867, Gutchess & Yawger's indebtedness to the defendants of \$4403.81, had not been paid, but was then due and owing. That on that day, or very soon thereafter, the defendants credited one half of the net profits of said cargo of wheat,

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\$748.72, upon the said indebtedness of Gutchess & Yawger. That on or about the 7th day of September, 1867, Gutchess & Yawger demanded the other half of the net profits of said cargo of grain, to wit, \$748.72, of the defendants; and the defendants declined and refused to pay over the same or any part thereof; that before the commencement of this action, and on or about the 22d day of November, 1867, the said Gutchess & Yawger, for value, sold, assigned and transferred the other half of the net proceeds of the said cargo of wheat, amounting to \$748.72, to the plaintiff in this action.

The referee found, as conclusions of law:

1st. That the contract made by Gutchess & Yawger and the defendants, on the last of July, 1867, was a legal, valid and binding contract.

2d. That under and by virtue of the said contract, the one half of the net profits of said cargo of wheat, \$748.72, belonged to, and was the property of, said Gutchess & Yawger; and the defendants had no right to apply the same, or any part thereof, upon the prior indebtedness of said Gutchess & Yawger, but were bound, by said contract, to pay over the same to the said Gutchess & Yawger.

3d. That by virtue of the said assignment and transfer from Gutchess & Yawger, on the 22d day of November, 1867, the said one half of the net profits of said cargo of grain became the property of the plaintiff in this action.

4th. That the indebtedness of the said Gutchess & Yawger to the defendants could not be set off against the half of the said net profits of the cargo of wheat.

5th. That upon all the facts the defendants were liable to the plaintiff for the amount of the one half of the net profits of the said cargo of wheat, \$748.72, together with interest thereon from the 7th day of September, 1867, amounting to the sum of \$876.83, for which sum he ordered and directed judgment for the plaintiff against the defendants, together with costs and disbursements.

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On the trial, when the plaintiff rested his case, the defendants moved that the complaint be dismissed ; because,

1. The evidence shows that these assignors were and are indebted to the defendants from the 29th day of July, 1867, down to the present time, in the sum of \$4403.81 and that they were so indebted at the time of the assignment of this demand.

2. That the assignors, after taking out the whole of the profits of the boat load of wheat, are still indebted to the defendants in a large sum.

3d. That the assignment through which the plaintiff derives title to the cause of action, alleged in the complaint, is subject to and defeated by the said continuing indebtedness of \$4403.81.

4. That the defendants had and have a legal right to apply the whole of the profits of said boat load of wheat upon their then existing greater indebtedness of Gutchess & Yawger, whatever may have been the terms of the contract under which such profits arose and came to the defendants' hands.

5. That the plaintiff has not proven sufficient facts to constitute a cause of action against the defendants.

The referee denied the motions, and to such denial and to the denial of each and every one thereof, separately, the defendants duly excepted.

From the judgment entered upon the report, the defendants appealed.

The principal question, upon the appeal, was, whether the defendants had a right to apply *the whole of the net profits* of the grain to the payment of the old indebtedness of Gutchess & Yawger to them, in direct opposition to their contract.

Miller & Hawley, for the appellants.

I. The prior and continuing indebtedness of Gutchess & Yawger to the defendants, was and is a legal and

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valid set-off against, and extinguishment of, the demand in suit. A defendant has a right to insist upon a set-off, though he has positively agreed to account for and pay over to the plaintiff moneys which the plaintiff has authorized him to receive as his agent. (*Downer v. Eggleston*, 15 *Wend.* 51. *Waterman on Set-Off*, §c. 630-640, §§ 579, 580, and cases cited.) The principle has long been settled, (in this State and in England,) that the right of set-off may be insisted on though an express promise has been made to relinquish it, founded on a good consideration. (*Lovett v. King*, 16 *Ind.* 464. *Barb. on Set-Off*, 93, 137. 1 *Wait's Law and Prac.* 966. 2 *Cowen's Treat.* 197. 2 *Parsons on Cont.* 248. *McGillivray v. Simson*, 2 *Car. & P.* 320. *S. C.*, 9 *Dow. & Ryl.* 35; 15 *Wend.* 61.) This defense is available against the plaintiff. (*Code*, § 112.)

II. The defendants, factors or commission merchants, had a lien for their general balance, upon all the goods of their principal consigned to them in the general course of business, and upon the avails of such goods when sold by them. (2 *Kent's Com.* 640. *Id.*, 10th ed. 888, note, and cases cited. 10 *Paige*, 205-210. *Farnum v. Boutelle*, 13 *Metc.* 159.)

III. The referee erred in not nonsuiting the plaintiff on the grounds stated by the defendants.

IV. The referee erred in not finding, as requested by the defendants, that the plaintiff's assignors, the said Gutchess & Yawger, themselves violated and abandoned the alleged agreement set out in the complaint. 1. The said agreement was for the entire season's business. 2. Gutchess & Yawger notified the defendants, before the receipt of this grain, that they did not intend to go on. 3. Gutchess & Yawger authorized "all the gain, if there be any, to be applied on their old indebtedness." 4. This being so, Gutchess & Yawger had no claim against the defendants to assign to the plaintiff, and the plaintiff took nothing by his assignment.

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V. Gutchess & Yawger violated and abandoned their agreement set out in the complaint, (1) by the withdrawal of Houghtaling, and the security deposited by Houghtaling; (2) by shipping grain to Walbridge. 1. The drafts drawn by Gutchess & Yawger were to be indorsed by Houghtaling. The defendants could not hold securities for any other drafts. 2. Houghtaling not only withdrew, but he withdrew \$1800 of the securities. 3. Houghtaling had been for years the active man of the concern—the only one in it of experience. The defendants were not bound to deal with new men. 4. Gutchess & Yawger did not ship grain to the defendants “from this time out,” *i. e.*, through the season, but after sending this load they shipped to Walbridge.

VI. The referee erred in sustaining the plaintiff's objection to this question asked Houghtaling by the defendants: “What was your financial condition during your connection with Gutchess & Yawger?” Also in sustaining the plaintiff's objections to the several questions asked Ira B. Gutchess by the defendants. These questions related to an essential element of the contract—Houghtaling's connection with the business—and were pertinent. Also, in sustaining the plaintiff's objection to the question asked the witness Upham, for the same reason.

VII. Gutchess & Yawger having first violated and abandoned their agreement, neither they nor their assignee can maintain an action upon it for an alleged breach thereof, nor for a specific performance of its conditions. (*Willard's Eq. Jur.* 297.) The defendants had a right to extinguish Gutchess & Yawger's (or the plaintiff's) smaller demand, by their greater demand existing at the time against Gutchess & Yawger, and due before the assignment to the plaintiff. The defendants had a right to insist upon their lien for their general balance against Gutchess & Yawger, growing out of their prior dealings as commission merchants or factors for and with them. The defendants had

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a right to defeat the plaintiff's cause of action by reason of the prior default of the plaintiff's assignors, in reference to the contract out of which the demand in suit arose.

VIII. The referee erred in ignoring the several questions of fact, material to the issue, upon which he was asked to find by the defendants, and as to which he neglected to find one way or the other. These facts constituted one of the defences set up by the answer, and were therefore pertinent. They were supported by evidence in reference to which there was no conflict. The failure of the referee to find as to these facts—necessarily negating them by implication, (49 *Barb.* 362,) is an error of law, for which a new trial should be granted.

H. V. Howland, for the respondent.

The plaintiff claims and insists that the contract of July 26, 1867, was binding upon the defendants, and that they had no right to use, or convert, or apply in any way, the one half of the net profits arising from sales in any other manner than was agreed upon.

I. The contract between Gutchess & Yawger and the defendants, to apply one half the net profits to the payment of the debt of Gutchess & Yawger to the defendants, and no more, was binding on them; and they had no right to apply the other half to the payment of their debt, contrary to their agreement. And the fact that Gutchess & Yawger owed the defendants a large debt at the time of the contract, which still remains unpaid, gives them no right to misapply our money, contrary to their agreement, or to offset their demand against our claim. The cases relied upon by the defendants do not sustain their position. The case of *Eland v. Karr*, (1 *East*, 375,) was assumpsit for goods sold and delivered. The defendant pleaded an offset. The plaintiff replied that the goods were to be paid for in ready money. The court decided that the debt due to the defendant might be set off against the plain-

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tiff's demand. The case was decided under the statute of 2 Geo. II. But the contract in that case to pay in ready money was, in its legal effect, general, and had no reference to the debt due the defendant. It was merely to pay for the goods. Here the effect is to provide just what portion of the profits shall, and what shall not, be applied upon this very debt. It is an express contract not to apply more than one half the profits on said debt. The case of *Downer v. Eggleston*, (15 *Wend.* 52,) was an action to recover for lumber which the defendant agreed to sell for the plaintiff, and account to the plaintiff for the proceeds. The defendant sought to set off an indebtedness owing him by the plaintiff. The court held that the defendant had a right to insist upon a set-off, although he agreed to account for the sales of the lumber. The court says, at page 57: "The defendant agrees that if he should be able to sell the timber, he will account to the plaintiff for all it shall fetch, not that he would pay over all the money to him," &c. And the learned judge came to the conclusion, in that case, that the defendant had not violated any honorary obligation of the agreement in asking to have the proceeds of the timber applied to the installment of the bond. But in that case the agreement of the parties had no reference to the indebtedness existing between them at the time. It was a simple agreement to account for the avails of the timber, and not an agreement, like ours, to apply a certain portion of profits to the payment of a certain debt, and pay the rest of our money to us. In the case of *Henniss v. Paige*, (3 *Whart.* 275, cited in *Waterman on Set-Off*, 637,) the rule is laid down, that where there is an agreement not to offset a demand, or to apply it in a different way, it will be binding. In that case "the obligee in a bond agreed with the obligor, that in consideration of a compromise of conflicting claims, and further advances of cash, the obligor, in the bond, bound himself not to purchase claims against the obligee to set off against the bond. The

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promise or agreement was a part of the consideration, without which the bond would not have been given, and therefore, on the plainest principles of honesty and good faith, the obligor was held to his bargain. The court held that he had precluded himself, by his agreement, from setting off a judgment which had been assigned to him after the execution of the bond. The statutes, the court held, were intended for the benefit of the defendants, and it is a privilege that they may or may not exercise, as they think proper. If they choose by their agreement to waive the benefit of the statute, they are at liberty to do so, and it is the duty of the court not to make agreements for the parties, but fully and fairly carry them into execution.

II. But this case is materially different from any of the cases cited by the defendants. In those cases the question was simply whether one indebtedness could be set off against another, contrary to an agreement not to do so. In this case the defendants were not indebted to Gutchess & Yawger for grain sold by them to the defendants, but they held in their hands \$748.72 of the moneys of Gutchess & Yawger, and to which the defendants had no title whatever. The defendants were but the agents of Gutchess & Yawger to sell this grain, and the avails, except so far as otherwise applied by express agreement, belonged to the principals; and it is submitted they could not apply or appropriate the moneys of the principals, contrary to agreement, or their permission. (24 *How. Pr.* 274. 14 *id.* 131. 49 *Barb.* 403.)

III. But it is claimed further, that the demands of the defendants against Gutchess & Yawger were unliquidated demands, and were not the subject of offset, under the statute. The indebtedness of Gutchess & Yawger to the defendants was simply an open running account. The referee does not find as matter of fact that this long account had ever been liquidated or settled by the parties, or any

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one else. And he could not so have found under the evidence. (3 *R. S.* 635, 5th ed. *Butts v. Collins*, 13 *Wend.* 139.) Again, we say, the defendants' claim cannot be allowed as a set-off against the plaintiff's demand in this action, for the reason that the demand upon which this action is founded is not the subject of set-off itself. (3 *R. S.* 635, subd. 5, 5th ed.) It is not a demand for real estate sold, personal property sold, or for money paid, or services done, nor liquidated.

By the Court, JOHNSON, J. The referee held, as a conclusion of law, that the prior indebtedness from the plaintiff's assignors to the defendants, was not a valid set-off, and could not be allowed against the claim assigned for one half the profits of the cargo of wheat. At the time the wheat was shipped by the plaintiff's assignors to the defendants, to be sold on commission, the former were indebted to the latter in the sum of \$4403.81, which was then due. It had been agreed between them that the plaintiff's assignors should, through the summer of 1867, ship grain to the defendants, to be purchased with funds to be furnished by the defendants, and sold by them on commission, and that one half the net profits should be applied by the defendants upon the old indebtedness, and the other half paid over to the said assignors by the defendants, and not otherwise applied. This agreement did not deprive the defendants of the right to set off enough of their claim to extinguish the demand in suit, in the hands of the plaintiff. Their demand against the plaintiff's assignors was due at the time of the assignment. It was a proper demand to be set off. The action was upon a demand which would have been the subject of set-off. There is nothing in the agreement as found, which could have prevented the defendants from commencing an action to recover their demand against the plaintiff's assignors at the time of the assignment, or when this action was com-

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menced. The statute, therefore, gave to the defendants the right to set off their demand. (2 R. S. 354, § 18.)

It has been repeatedly held that an agreement like the one found in this case did not debar the defendant of his right of set-off. (*Downer v. Eggleston*, 15 Wend. 51. *Eland v. Karr*, 1 East, 375. *Cornforth v. Rivett*, 2 Maule & Selw. 510. *McGillivray v. Simpson*, 9 Dowl. & Ry. 35. S. C., 2 Car. & P. 320. *Barb. Law of Set-Off*, 93, 137. 2 Pars. on Cont. 249. 1 *Wait's Law and Prac.* 966.)

The case of *McGillivray v. Simpson*, (*supra*), is quite like the case at bar, and it was held that the agreement was not binding upon the defendant, so as to deprive him of the legal rights he possessed, of lien and of set-off. In every case where there is a good cause of action, and also a valid claim, which is the subject of set-off, in the hands of the defendant, both being due, there is a mutual violation of the obligation to pay.

The statute of set-off proceeds upon the equitable principle of not allowing one party to recover from another, money due, while at the same time he withholds from such other that which is legally and equitably due from himself. The exception to the conclusion of law was, therefore, well taken, and the judgment must be reversed.

Judgment reversed, and a new trial ordered; costs to abide the event.

[FOURTH DEPARTMENT, GENERAL TERM, at Syracuse, November 14, 1870.
Mullin, P. J., and *Johnson* and *Talcott*, Justices.]

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3ap	161
58b	413
61ad	91

WAFFLE vs. THE NEW YORK CENTRAL RAILROAD COMPANY.

Every person has the right to drain the surface water from his own land, to render it more wholesome, useful or productive, or even to gratify his taste or will; and if another is inconvenienced, or incidentally injured, thereby, he cannot complain.

No one can divert a natural water course and stream, through his land, to the injury of another, with impunity; nor can he, by means of drains or ditches, throw the surface water from his own land upon the land of another, to the injury of such other.

But where a person can drain his own land without turning the water upon the land of another, or where it can be done by drains emptying into a natural stream and water course, there can be no doubt of his right thus to drain, even though the effect may be to increase the volume of water unusually, at one season of the year, or to diminish the supply at another.

No one can be required to suffer his land to be used as a reservoir, or water-table, for the convenience or advantage of others.

The owner of land through which a stream flows may increase the volume of water by draining into it, without any liability to damages by a lower owner. He must abide the contingency of increase or diminution of the flow in the channel of the stream, because the upper owner has the right to all the advantages of drainage or irrigation, reasonably used, which the stream may give him.

The plaintiff owned a saw-mill, upon a small stream nearly two miles below the point where the defendant's road crossed such stream. At that point, the land was naturally low and marshy, and the defendant, in constructing its road, raised the bed thereof above the natural surface of the land, by excavations on each side, leaving ditches, by means of which the surface water was drawn off and passed into this stream, on each side of the road-bed, where the stream was crossed by the road. Such ditches were wholly upon the defendant's land, and conducted the surface water into the stream upon its own land. The complaint alleged, and the testimony tended to prove, that by means of these ditches the water from such low land was drawn off and led into the stream so rapidly that in times of flood and high water, it filled the plaintiff's pond so full that he could not use the same, but was compelled to open his gates and let the water flow through; and that in a dry season the supply of water in the stream was, by the same means earlier exhausted, and the plaintiff's mill thereby compelled to lie idle and unemployed, for want of water, for a much longer period than formerly. *Held* that these facts constituted no cause of action; and that the plaintiff was properly nonsuited.

MOTION by the plaintiff, for a new trial, upon a case and exceptions.

The action was brought to recover damages for an

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alleged disturbance of certain water rights of the plaintiff. The complaint alleged that the plaintiff owned a saw-mill on Little Black Creek, in the town of Gates, in the county of Monroe, and that the defendant interfered with and diverted the water of the stream from its course, by unlawfully making two ditches, one on each side of its track, by means of which the water was diverted from the mill. The complaint then proceeds to allege that in times of high water these ditches bring the water in immense quantities into the plaintiff's mill pond, so as to flood, impede and destroy the operation of the mill for many months in the year, and that by means of these ditches the natural reservoirs upon the lands surrounding, and in the vicinity of the railroad above and around the mill, are so drained that in dry times there is no water to run the mill. Then follows the general allegation that by means of these ditches the defendant "wrongfully, injuriously and unlawfully stopped, prevented, hindered and diverted, and turned and changed the waters and the running and flow thereof of the said streams or water courses from passing, running or flowing along these heretofore usual and natural courses to the said saw-mill works * * * as the same heretofore did do."

The answer denied each and every allegation contained in the complaint; set up the statute of limitations; and alleged that at the time of the making of the two artificial channels referred to in the complaint, the defendant was, and ever since had been the owner and operator of a railroad which passes through lands in the vicinity of the lands of the plaintiff, mentioned in the complaint; that the artificial channels referred to in the complaint, are upon the land and along side of the track of the defendant's said railroad; that the same were and are necessary to the proper construction and maintenance of said track, and for the safety thereof, and the trains passing over the same; that in the making and maintenance of said artifi-

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cial channels, no water was or is diverted from the stream, the waters whereof pass through or upon the lands of the plaintiff.

The issue thus joined came on to be tried at a circuit held at Rochester, in January, 1870, by a justice of this court and a jury.

It appeared in evidence that the plaintiff's mill was about two miles below the point where the two artificial ditches in question enter the creek; that the defendant's road crosses no part of the plaintiff's land; that the creek supplying the plaintiff's mill crosses the defendant's road but once, and that at Cold Water station; and that the ditches enter the stream of the culvert by that station, and are close to the work, and within the defendant's land.

It was claimed by the defendant that it was clearly established that the ditches were entirely on the defendant's land; that they carried to the creek surface water that naturally went there; and that farmers had used these ditches as a means of getting rid of surface water as rapidly as possible.

When the plaintiff rested, the defendant moved that the plaintiff be nonsuited, upon the following grounds:

First. That it appeared in evidence that the defendant had been in the possession and ownership of the land, through which these artificial ditches run, for a period of more than twenty years preceding the commencement of the action; and that the ditches had been constructed upon the defendant's land for a longer period than twenty years before the commencement of the action. And that, therefore, there was a presumption of a grant to the defendant, with the right to make and maintain the same.

Second. That it appeared that the ditches were constructed upon the land of the defendant exclusively, and that they discharged the waters into the creek, upon which the plaintiff's saw-mill was situated, and it appearing that the waters so discharged into the creek were only surface

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waters, the defendant had the right to make and maintain the ditches, and so discharge the surface waters, and that the plaintiff was not entitled to recover damages on account of it.

Third. That there was no allegation in the complaint, and this action did not proceed upon the ground, that the defendant had been guilty of any negligence in the construction of its road or in the making of these ditches.

Fourth. That the defendant, as a necessary incident, had the right to make and maintain these ditches for the purpose of operating its road, and there being no allegation of negligence in construction and maintenance of the same, the plaintiff could not recover.

The court granted the motion, and the plaintiff, by his counsel, excepted. The court thereupon also ordered that the plaintiff have liberty to make a case containing exceptions, on which to move for a new trial, and that the same be heard in the first instance at the general term, and that in the meantime and until the decision of the general term, all further proceedings on the part of the defendant be stayed.

Geo. E. Ripsom, for the plaintiff.

I. The stream in question was not the defendant's premises, and it had no right to divert it, nor change the usual flow of the waters, either by diminution or increase; but was bound, under the statute, to leave and keep the stream in its natural and usual channel, without affecting the volume of the water. (3 R. S. 617, § 28, *subd.* 5, *Edm. ed.*) From the evidence, it appears that this stream had been used in a particular manner, before and since 1839, by which use the plaintiff had acquired the right to so continue its use, unless he should lose it by his acts. These channels were not completed until 1854, and were not put down until 1848 or 1849, from which time, (says the plaintiff,) "they commenced doing me damage;" and this action was commenced in 1867. So that, as the proof stands, the

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defendant is not in a position to claim the right to maintain these channels by prescription.

II. The proofs made are convincing to the mind that the habit of the stream, by reason of the channels in question, had undergone a marked change, and one, too, detrimental to the plaintiff. The question of negligence in their construction or maintenance does not arise. (*Robinson v. N. Y. and Erie R. R. Co.*, 27 Barb. 512, 522. 2 Kern. 486.) But the question of fact was tendered under the statute, whether the defendant had restored—preserved the stream or water course along which its road was built to its former state, or to such state as not unnecessarily to have impaired its usefulness. And also the further question of fact, whether there was a change in the flow of the stream, and whether that change was attributable solely to the existence and action of these two channels. The consideration of which would embrace, whether a few private ditches leading from a few farms into these channels, would or did produce the same effect as if they had been led into the stream from each farm, and whether it was the waters from these farmers' ditches, or the two channels, that did the mischief. As to the farmers' ditches, what was the peculiar formation of the soil and land, and whether in the natural course of things they would have been led into the stream, or how otherwise; and if led into the stream, what the effect would have been. When the farm ditches were put down does not appear, and the reason of the increase of water and damage for the ten odd years, is probably due to the fact that when the defendants completed these channels, they cut them through these ridges, (which turned the waters in the hollow into the stream,) and brought waters from a point and territory which, before that, flowed in an opposite direction, possibly into the head waters of this stream, and if so, were longer in their approach to the plaintiff's mill. But this stream was the natural channel

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to ditch into to drain the lands, and the defendant, if it permits the use to be made of its channels as appears in the case, must be held responsible for the result.

III. The waters were not mere surface waters; and if they were, the plaintiff having acquired the right to have the waters of the stream above him flow to him in their usual and natural way, the defendant, or any other person or persons, has not the right, it is submitted, to change that habit or custom. And if the defendant, by drainage of surface waters over a large tract of territory, collects the waters in one body and throws them into the stream in a body at a single point, which impairs the use of the stream materially, it is submitted that an action will lie.

IV. The following authorities are referred to as bearing upon all of the foregoing propositions: *Belknap v. Trimble*, (3 Paige, 577, 605;) *Haight v. Price*, (21 N. Y. 241;) and at page 247 the court says: "The plaintiff had a right to have the whole stream pass that point of its course in its natural bed," &c. And this is what the plaintiff contends for here. (*Bellinger v. N. C. R. R. Co.*, 23 N. Y. 42. *Cott v. The Lewiston R. R. Co.*, 36 *id.* 214. *Pixley v. Clark*, 35 *id.* 520.) "If the face of the country is such that it necessarily collects in one body so large a quantity of water, after heavy rains and the melting of large bodies of snow, as to require an outlet to one common reservoir, if such water is regularly discharged through a well defined channel which the flow of water has made for itself, and which is the accustomed channel through which it flows and has flowed from time immemorial, such channel is an ancient natural water course." (*Earl v. De Hart*, 1 Beasley, 180, 283, 284.) "The right of every owner of land, through which a stream of water flows, to the use and employment of the water, to have the same flow in its natural and accustomed course without obstruction, diversion or corruption, extends to the quality as well as to the quantity of the water. (*Halsman*

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v. *Boiling Springs Bleaching Co.*, 1 *McCarter*, 335, 342.) The cases of *Kauffman v. Griesimer*, (26 *Penn.* 407,) and *Martin v. Riddle*, (*Id.* 415,) with some others, illustrate the principles of law in reference to the right of drainage in the interest of agriculture, and improvements of land, and are worthy of particular consideration. The first case was that of natural drainage. The court says: "One has no right to alter the natural drainage so as to throw upon his neighbor, waters that he had not received before; one may drain his land as advantageously to himself as possible, but he must not acquire that advantage at the expense of his neighbor; the defendant could have no right to prevent the waters of floods and freshets flowing where they were accustomed to flow; it was the plaintiff's right that such water should flow there, and indeed all the water that had been accustomed to flow there. These cases (*Williams v. Gale*, 3 *H. & John.* 231, and *Martin v. Riddle*,) recognized the principle that the superior owner may improve his lands by throwing increased waters on his inferior, through the natural and customary channels, which is a most important principle, not only to agricultural but to mining operations also; the principle therefore is to be maintained, but it should be prudently applied; this principle was greatly misapplied by the plaintiffs when they supposed they might not only increase the ordinary flow, but might dig a new channel for it, to and into the defendant's land; the only servitude the plaintiff could claim in the defendant's land was that it should receive the overflow which was natural and customary." (*Potter v. Peck*, 16 *Ohio*, 334. *Martin v. Sett*, 12 *Ala.* 501.) In *Martin v. Riddle*, it appeared that there was on the defendant's land a natural channel through which the falling water and some living springs were naturally discharged from the land of the plaintiff and others. The court says: "I shall speak now of the general principle of the law, in the matter of rain

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water and drainage, of the respective rights and duties of adjoining proprietors in relation thereto. They are, in general, the same as in the case of running water—they follow nature; nor has the owner of the upper ground a right to make any excavations or drainage by which the flow of water is diverted from its natural channel, nor can he collect into one channel waters usually flowing off into his neighbors' fields by small channels, and thus increase the waters upon the lower fields. If it be difficult to ascertain from the character of the surface what is the natural channel, then the course in which the water has long been peaceably and openly permitted to run, will be considered as having a legitimate origin. If the owner of the upper ground wrongfully divert an unnatural quantity of water upon the ground of a lower neighbor, by collecting small streams together and discharging them at one place, or by any other means, the neighbor below may have an action against him. When there is a natural channel or hollow for discharging the flow of water, it must be suffered to remain until altered by agreement of those concerned." In *Dickinson v. Worcester*, (7 Allen, 19, 22,) the court says: "But one proprietor of land has no right to cause a flow of the surface water from his own land over that of his neighbor, by collecting it into drains or culverts or artificial channels; he cannot thus, by his own aid merely, connect a flow of surface water into a stream passing from his own over his neighbor's land, with all the legal incidents of a natural water course." In *Brand v. Murphy*, (37 Vt. 99,) the court says: "That if the surface water naturally falling upon the plaintiff's land would run off upon the defendant's land, the defendant had no right to prevent its continuing to do so."

V. The defendant not only extended these two channels a great distance, but they cut them through natural barriers—viz., these ridges—and by so doing collected the waters from this territory and brought them down

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into the stream at one place, and there discharged them upon the plaintiff in an unnatural and unaccustomed manner.

VI. There was a mistrial, and a new trial should be ordered for that reason. (*Hoagland v. Miller*, 16 Abb. 103. *Lake v. Artisans' Bank*, 17 id. 232. *Cobb v. Cornish*, 16 N. Y. 602, 604.)

Edw. Harris, for defendant.

The nonsuit was properly granted, upon the grounds stated in the application therefor. (*Angell on Water Courses*, § 108 and cases cited; § 108, a, b, c, s. *Rawstron v. Taylor*, 11 Exch. 369. *Goodale v. Tuttle*, 29 N. Y. 467. *Lampman v. Milks*, 21 id. 505 to 507.)

By the Court, JOHNSON, J. There is no dispute about the facts in this case. The plaintiff's saw-mill is upon a small stream, nearly two miles below the point where the defendant's road crosses such stream. At that point the land is naturally low and marshy, and the defendants, in constructing their road, raised the bed thereof above the natural surface of the land, by excavations on each side, which made ditches, by means of which the surface water of this low, marshy land, was for a considerable distance drawn off, and passed into this stream on each side of the road bed, where the stream is crossed by the road. These ditches are wholly upon the defendants' land, and conduct the surface water into this stream upon their own land. The only cause of action stated in the complaint is, in substance, that by means of these ditches, the water from this low land is drawn off and conveyed into this stream more rapidly than it would be otherwise; and in the wet season, and in times of flood and high water, filled the stream and the plaintiff's pond so full, and increased the volume of water to such an extent, that he could not use the same, but was compelled to open his gates and let the

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water flow without using the same; and that as the dry season came on, the water was by the same means drawn off so rapidly from these low, wet grounds, that the stream did not keep up as it did before, and the supply which said stream was accustomed to receive, gradually, from from such wet lands, was earlier exhausted, and the plaintiff's mill thereby was compelled to lie idle and unemployed for want of water, for a much longer period than formerly, and a much longer period than it would, had these drains not been made. The testimony tended to sustain these allegations in the complaint. It appeared from the evidence, that there was no natural outlet or water course from this low wet land into the creek, but a gentle and gradual inclination of the surface for a long distance towards the stream. The defendants' ditches extended through these lands for a distance of over two miles; and it appears that the owners of the lands along this distance, adjacent to the railway, have availed themselves of the defendants' ditches, and drained the surface water from their lands, by means of ditches through the same, emptying into the defendants' ditches. By these means the surface water is discharged from these wet lands, and the same are rendered tillable and productive, instead of remaining waste lands, and serving as a mere reservoir to hold water for the use of the plaintiff's mill, for a few more days or weeks each summer.

It is entirely clear that these facts constitute no cause of action. / Every person has the unquestionable right to drain the surface water from his own land, to render it more wholesome, useful or productive, or even to gratify his taste or will; and if another is inconvenienced, or incidentally injured thereby, he cannot complain. No one can divert a natural water course and stream, through his land, to the injury of another, with impunity; nor can he by means of drains or ditches, throw the surface water

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from his own land upon the land of another, to the injury of such other. But where a person can drain his own land without turning the water upon the land of another, or where it can be done by drains emptying into a natural stream and water course, there can be no doubt of his right thus to drain, even though the effect may be to increase the volume of water unusually, at one season of the year, or to diminish the supply at another.

No one can be required to suffer his land to be used as a reservoir or water-table for the convenience or advantage of others. This principle is laid down by all the judges, in *Rawstron v. Taylor*, (11 *Exch.* 369.) It is also recognized as the true rule by Denio, Ch. J., in *Goodale v. Tuttle*, (29 *N. Y.* 459,) at page 467, where he says: "In respect to the running off of surface water caused by rain or snow, I know of no principle which will prevent the owner of land from filling up the wet and marshy places on his own soil, for its amelioration and his own advantage, because his neighbor's land is so situated as to be incommoded by it. Such a doctrine would militate against the well settled rule that the owner of land has full dominion over the whole space above and below the surface." In *Miller v. Loubach*, (47 *Penn.* 154,) Thompson, J., in delivering the opinion of the court, says: "No doubt the owner of land through which a stream flows may increase the volume of water by draining into it, without any liability to damages by a lower owner. He must abide the contingency of increase or diminution of the flow in the channel of the stream, because the upper owner has the right to all the advantages of drainage or irrigation, reasonably used, which the stream may give him." This rule commends itself to general acceptance, by its sound sense, and easy adaptability to the common wants, interests and necessities of adjacent owners of lands. (See also *Kauffman v. Greisemer*, 26 *Penn.* 407; *Martin v. Riddle*, *Id.* 415, note;

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Williams v. Gale, 3 H. & J. 231; *Angell on Water Courses*, 6th ed., §§ 108 a to 108 s;) where the whole doctrine of drainage is examined and treated.

The plaintiff was therefore properly nonsuited, and a new trial must be denied.

[FOURTH DEPARTMENT, GENERAL TERM, at Syracuse, November 14, 1870.
Mullin, P. J., and *Johnson* and *Talcott*, Justices.] ✓

THADDEUS C. KINNIER vs. ABBY A. KINNIER.

In an action by a husband against his wife, for a decree declaring a divorce obtained by her, from her former husband, in Illinois, void for want of jurisdiction and for irregularity, the complaint admitted that both parties went to Illinois, and that both appeared in the action there; *Held* that such appearance clearly gave the court jurisdiction over the persons of both parties; and whether the court could grant a divorce depended not on jurisdiction, but upon the pleadings and evidence in the case.

Held, also, that the plaintiff could not avail himself of such causes to have a marriage between him and the defendant declared void, when he, at the time, had knowledge of the divorce, and that the defendant had gone to Illinois to procure one.

Even if this court could, within a proper time, declare a judgment for divorce, rendered in the State of Illinois, void, no such action should be taken after the judgment has become absolute, and the time for appealing has expired, so that it cannot be reversed in that State. The judgment is then final, and the rights of the parties, under it, are perfect; and this court should not interfere with it.

APPEAL from a judgment entered at a special term, allowing a demurrer to the complaint. The decision at special term is reported 53 *Barbour*, 454, where the facts are stated.

G. W. Parsons, for the plaintiff.

C. A. Seward, for the defendant.

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By the Court, INGRAHAM, J. In this action the plaintiff seeks to get rid of a marriage with the defendant, by an application to this court to declare a judgment decreeing a divorce between the defendant and her former husband void for want of jurisdiction and for irregularity.

How far this court has any power to declare a judgment in the courts of another State void, might well be a subject of inquiry; but that it cannot be done in this case is, I think, clear.

The case comes up on demurrer to the complaint. The complaint admits that both parties went to Illinois, and that both appeared in the action there. Such appearance clearly gave the court jurisdiction over the person of both parties; and whether the court could grant a divorce, depended not on jurisdiction, but upon the pleadings and evidence in the case. Any defect in the pleadings, or any want of evidence on the trial, might have been waived by the parties, or facts might have been admitted, without proof, that would warrant the judgment.

Nor do I think the plaintiff here can avail himself of such causes, to have a marriage made by him with the defendant declared void, when he at the time had knowledge of the divorce, and that the defendant had gone to Illinois to procure a divorce, for the purpose of avoiding notoriety at the east.

From the time which has elapsed since the judgment of divorce was rendered, the same has become absolute, and could not be reversed in that State. It is a final judgment, and of binding force in that State.

Even if this court could, within a proper time, have declared the same void, which I very much doubt, I am clearly of opinion that no such action should be taken after the judgment in Illinois has become perfect, and the time for appealing has expired. The judgment is final, then, and the rights of the parties under it are

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perfect, and this court should not interfere with it in this action.

Order appealed from affirmed.

[NEW YORK GENERAL TERM, April 5, 1869. *Clerke, Sutherland and Ingraham*, Justices.]

PHOEBE SHAFER vs. ABRAM LOUCKS.

If the plaintiff, in an action for malicious prosecution, fails in the proof of either of the following particulars, viz., that the suits instituted against him by the defendant were instituted without probable cause and from malicious motives, and with malicious intent—he is not entitled to a verdict.

In such an action it is not erroneous for the judge, in his charge, to present the two theories of the case held by the plaintiff and defendant, to the jury, and to leave it to them to say whether an offensive charge contained in the complaint in a former action brought by the defendant, was inserted in the honest belief that it was necessary to sustain the action, or merely as a cover to a malicious purpose of destroying the plaintiff's character; where it appears that the offensive charge was not the cause of action, but an incidental act, stated by way of aggravation, to increase the amount of the recovery.

Nor is it error for the judge to refuse to charge that "if the jury, from the evidence before them, believed that the defendant believed he had a cause of action against the present plaintiff, no matter how small the recovery might have been, it was a legal right to bring the action therefor, and it was no matter how much malice might have inspired the defendant; the plaintiff could not recover."

Good faith, merely, is not sufficient to protect the defendant from liability, in an action for malicious prosecution. There must be *reasonable* ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a *cautious man* in the belief that the plaintiff was guilty, to make out such a probable cause as will be a defense.

Belief, and reasonable grounds for belief, are both essential elements in the justification of probable cause. A man is responsible if he fails to call in to his aid reason, caution and fairness. He must not act upon mere conjecture, or impulse or passion.

THIS is an appeal from a judgment entered upon the verdict of a jury, at the Schoharie circuit, in October, 1867.

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The action was for malicious prosecution. The defendant brought four successive actions in a justice's court, against the plaintiff, three of which were discontinued, and the fourth resulted in a verdict against the present defendant, who was the plaintiff in those several actions. The plaintiff was a district school teacher, and the defendant's children attended her school. A feeling of bitterness against the plaintiff arose, and was entertained by the defendant and his family, on account of her correction, in school, of the defendant's children; and the cause of action in the four suits, before different justices, by the defendant against the plaintiff, arose during her term of teaching; and the complaints of the defendant, in the justices' courts, which were for the use of the bed in which the plaintiff slept one night, contained statements well calculated to destroy the character of the plaintiff for chastity. At the circuit there was a verdict in favor of the plaintiff, for \$800. From the judgment entered thereon, the defendant appealed to this court. All other material facts sufficiently appear in the opinion.

H. Krum, for the appellant.

N. C. Moak, for the respondent.

By the Court, POTTER, J. When the plaintiff rested her case, at the trial, no motion was made for a nonsuit, or to dismiss the case for want of proving a cause of action. The testimony which had then been produced by the defendant was intended to destroy the case made by the plaintiff; the subsequent testimony of the plaintiff was to rebut or weaken that of the defendant. The briefs of parties present no objections taken to the admission of evidence by the judge, as error; and in this review we are bound to assume, as far as facts are in question, that they are truthfully found by the jury.

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It is not then for the court to review the evidence, to see whether or not the plaintiff was invited by the defendant or his family to occupy the room and bed for the use of which the defendant sued her; whether the defendant was advised by counsel that he had a good cause of action against the plaintiff for the use of the room and bed; whether the defendant made a full and fair statement of his case to his counsel; nor whether the defendant threatened to sue her, and break up her school. These questions were controverted; they were issues of fact on the trial, for a jury. The testimony was in conflict, and the jury have found a verdict upon them. The following propositions we must assume to be true, according to the charge to the jury, viz: That if the plaintiff failed in the proof of either of the following particulars, she was not entitled to a verdict; that the suits instituted against her by the defendant, were instituted without probable cause, and from malicious motives, and with malicious intent. If she succeeds in both she is entitled to a verdict. If she fails in either of these particulars, she is not to have a verdict. To this part of the charge there was no exception; and we are to take it for the law of the case.

In the form this case is before us, the only exceptions to be reviewed are those taken to the charge of the judge to the jury, or to his refusal to charge as requested. The first exception of the kind is to the charge of the judge, in the following words: "In the latter part of June, he brought an action against her, before a justice of the peace, in Summit. And in that action, he declared, 'that she was indebted to him for the use and occupation of a certain room in his house,' and demanded the sum of \$25. And alleged in the same complaint, *what does not appear to have been necessary to constitute an element of the cause of action* as thus brought—that the bed was dirtied and soiled by the use of herself and others, and the sheets stained and discolored."

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Before we can condemn this charge for unsoundness, we must look at it in its connection with the facts of the case, and at the whole charge in its explanations and modifications. The burden of showing its unsoundness is with the defendant. We are not furnished with the defendant's complaint before the justice; we can therefore only judge of it from the memory of the witnesses, as stated in the case. The action, as appears, was for the use of a room and bed. If this is correct, the value of the use and occupation depended upon the manner of its use; and the injury done to it by the occupant could, in such case, have been proved on the trial. The particular injury detailed in the complaint would not seem to be the cause of action, but a specification of a particular which enhanced the damages. This would seem to have been the view of the learned judge, as appears from other portions of his charge. He says, "He (defendant) must have known, it is claimed, that an action brought for the occupation of a room and bed, when the party had been invited to stay, by himself, or by members of his family in his presence, could not be maintained. He must have known, it is claimed, that such circumstances would not furnish any just pretense for bringing a suit for such service; and it is claimed, as to the residue of the complaint, to wit, for the soiling or staining of the bed clothes, that it was itself incidental to the use of the bed, if not abused; and that the abuse of the bed is not made the main ground of action in the suit, but was put forward on the part of the plaintiff as a mere pretense, for the purpose of carrying into effect the malicious spirit with which these suits were instituted." Though the defendant's counsel had directly excepted to that portion of the charge first above quoted, it would seem he desired a more clear understanding of the meaning of the language of the judge, and therefore he repeats the exception, in effect, as follows: "Defendant's counsel excepted to that portion of the charge which

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was understood to imply that the allegation in the complaint formerly made by the defendant here, against the plaintiff, that the bed was dirtied or soiled, or injured, was not required in an action to recover payment for the use and occupation of a room, but was unnecessary; that is, that the last allegation was unnecessary." This gave the judge the opportunity of explaining in the presence of the jury his meaning, and which he gave as follows: "I said it was unnecessary to the sustaining of a cause of action for the use of a room; if it was mentioned merely and simply as an aggravating circumstance connected with the use of the room, I do not mean to say that in proper language it might not be incorporated." As thus explained, or indeed without the explanation, I am not able to discover error in this part of the charge. It appears to me, in what the judge said, that he intended to present the two theories of the case, the plaintiff's and defendant's, to the jury, and leave it to the jury to say whether the spreading this indecent detail upon the complaint, was in the honest belief that it was necessary to sustain the action, or merely as a cover to a malicious purpose, of destroying the plaintiff's character. So far as we know, from the case, this offensive charge was not the cause, but an incidental act by way of aggravation, to increase the amount of the recovery. If this be so, there can be no objection to the charge in that respect.

It seems that the defendant's counsel, previous to the charge, had requested the judge to charge the following proposition as his second request: "That if the jury, from the evidence, believe that the defendant believed he had a cause of action against the present plaintiff, no matter how small the recovery might have been, it was a legal right to bring the action therefor, and it was no matter how much malice may have inspired the defendant; the plaintiff cannot recover." It was in answer to this very technical proposition that the judge charged this proposition

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with a qualification, in a paragraph out of which five separate exceptions are taken. He (the judge) says: "But I cannot charge *precisely* in the language of the second request which the counsel for the defendant has placed before me," * * "that is not precisely the law; the law requires something more than an honest belief on the part of the plaintiff that he has a good cause of action. The facts and circumstances must be such as really exist, or, as disclosed to him, that which he has a right to assume, and does assume, furnishes just reason to conclude that he has a fair cause of action against the other party. It requires something more than even good faith on the part of the plaintiff; it requires a fair judgment upon the facts disclosed, which facts furnish upon their face, to a prudent mind, and to a fair mind passing upon the case, the conclusion that he has a probable cause and just reason for instituting a suit."

The judge committed no error in refusing to charge the proposition in the language given by the defendant's counsel. The mere *belief* of the party that he had a cause of action, is not sufficient, upon authority; it should be an honest and a *reasonable* belief. (2 *Greenl. on Ev.* § 455.) "If there was a *reasonable* belief in the mind of the prosecutor it would be a justification." (*Seibal v. Price*, 5 *Watts & Serg.* 440.) "The facts and circumstances must be sufficient to make him, or any *reasonable* person, believe the truth of the charge before he instituted the proceeding." (*Delegal v. Highley*, 3 *Bing., N. C.*, 958.) "Probable cause," is defined, says Bronson, Ch. J., "a *reasonable* ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a *cautious* man in the belief that the person accused is guilty of the offense." (*Foshay v. Ferguson*, 2 *Denio*, 619. *Miller v. Milligan*, 48 *Barb.* 30. *Scanlan v. Cowley*, 2 *Hilt.* 489.) But a case more particularly in point, as authority for this charge, is that of *Hall v. Suydam*, reported in 6 *Barbour*, 83, decided

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at general term, in the fourth judicial district, by Paige, Willard and Hand, justices. This was a well considered case. The request to charge in that case was in effect the same as in this, viz: "1st. If the jury believed from the evidence, that the defendant acted in good faith in taking out the warrant, it was a defense. 2d. If the jury believed that the defendant acted *bona fide* in taking out the warrant on the advice of counsel upon a full and fair statement of the facts, that was a defense." It does not appear in what language the judge charged, in that case, but he refused to modify his charge in the particulars so requested. Paige, P. J., who delivered the opinion of the court in that case, in commenting upon these requests to charge, says: "This was in effect saying that the defendant was not liable if he acted in good faith in taking out the warrant. But good faith, merely, is not sufficient to protect the defendant from liability. There must be reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a *cautious man* in the belief that the plaintiff was guilty, &c., to make out such a probable cause as will be a defense." This is a decision at general term, by a court equal in character to any coördinate branch of this court, and whose opinions rank among the soundest expositions of law found in our reports. It has not been questioned or shaken, to my knowledge, as sound law, and we are bound to pay it due respect. Following this decision is the case of *Humphries v. Parker*, (52 *Maine*, 505.) The court holds that probable cause, "required a belief honestly entertained, and derived from facts and evidence, which in themselves were sufficient to justify a man who was calm, and not governed by passion, prejudice, or want of ordinary caution and care in believing the party guilty." That mere belief is not enough. Belief and reasonable grounds for belief, are undoubtedly both essential elements, in the justification of probable cause. I hold these cases to be sound adjudications upon

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the law, as to what is probable cause in actions brought for malicious prosecution. Tested by this rule, in cases cited, the charge of the learned judge in the case before us contains no error that demands a reversal of the judgment. Though varying in terms of expression, it does not in spirit differ from *Hall v. Suydam*. The words "*fair judgment*," and "*a prudent and fair mind*," and "*just reason*," do not change the sense. When the learned judge said, "it required something more than good faith," he then explained, and perhaps limited, and by the use of the words employed, showed exactly what he did mean. This explanation was sound. Good faith may be based upon mere conjecture—upon an opinion based on sudden impulse, or passion—upon an unreasonable statement or report, such as no fair, sensible or cautious man would ever adopt. The judge doubtless meant to say, (at least this is the fair import of his language,) that a man must *act fairly, prudently, cautiously and reasonably*, as well as in good faith. This, I think, is sound law. That is, he must not act upon mere conjecture or impulse, or passion. He is responsible if he fails to call in to his aid, in such case, *reason, caution and fairness*. A man may cultivate passion, prejudice or delusion, until he makes himself believe an absurdity. It would be monstrous if such a belief would protect him in his malice, to the destruction of character.

This includes all I propose to say as to the five several exceptions taken to the same number of sentences in one paragraph of the charge; all of which must be read together as one. Reading them as one, there is no error in this charge.

The result is, that the judgment should be affirmed.

[THIRD DEPARTMENT, GENERAL TERM, at Plattsburgh, July 5, 1870. *Miller*, P. J., and *Potter and Parker*, Justices.]

CLARK *vs.* NORTON and others, Assessors of the town of Canton.

Assessors have no power or authority to make an assessment against an individual after they have completed their roll for review, or on the day fixed for review.

The defendants exercised the power devolved upon them as assessors, in the months of May and June, 1868, and adjudged the plaintiff to be liable to assessment for that year, in the sum of \$2750, for real property, only, and completed their roll, and gave notice of the time and place of reviewing the same. *Held* that with this act their power and authority to determine assessments for the current year was exhausted; and that they had no power, afterwards, to strike out the assessment against the plaintiff, for real estate, transfer such assessment to a purchaser of the property, and assess the plaintiff on the roll in the same amount, for personal estate.

An assessment, made after the expiration of the time during which assessors are empowered to determine what persons, and what property shall be assessed, is made without authority, and void.

THIS is an appeal from a judgment entered on a verdict directed by the court, and also from an order refusing a new trial.

The plaintiff, previous to July 8, 1868, was a resident and owner of real estate in the town of Canton, N. Y. The defendants were the assessors of said town for the year 1868. As assessors, the defendants, between the first days of May and July of that year, assumed to have ascertained the taxable persons and property in said town, prepared an assessment roll, entered the name of the plaintiff therein as assessed for his real estate, extending the valuation at \$2750, with no assessment for personal property; and completed said roll by the first day of August. A copy of said roll was made for inspection, and due notice given of the time and place of review. On the 8th day of July the plaintiff sold his real estate in said town, the purchaser to pay all taxes brought against it for the year 1868, and on that day the plaintiff removed from said town and has not resided there since.

On the review day, which was August 18th, the plain-

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tiff did not appear before the assessors, nor cause any complaint to be made of said roll. On that day the purchaser of the plaintiff's real estate appeared before said assessors, but without any authority from the plaintiff, and asked the assessors to transfer to him, the purchaser, the assessment on said roll for real estate against the plaintiff. After consultation, the assessors complied with said purchaser's request; struck out said assessment for real estate against the plaintiff, and assessed it to the purchaser; at the same time, of their own volition, they assessed the plaintiff on said roll \$2750 for personal estate.

The roll, as thus amended, was afterwards completed and delivered to the supervisor of the town. It was by him presented to the board of supervisors of the county. That body extended a tax against said plaintiff on said assessment for personal property, and a warrant was issued and delivered to the town collector for collection. By virtue of said warrant that officer collected from the plaintiff \$70.70. Upon the foregoing facts, judgment was directed for the plaintiff.

W. C. Cooke, for the appellant.

C. O. Tappan, for the respondent.

By the Court, JAMES, J. The only question material to consider in this case, is the power and authority of assessors to make an assessment against an individual after they have completed their roll for review, or on the day set apart for review. If at that time assessors have jurisdiction and power to assess persons and property not previously assessed and entered on the roll, the judgment in this case was erroneous, and should be reversed; otherwise, it was right, and the defendants personally responsible for their unauthorized act. Assessors derive all their powers and authority from the statute, and must, to keep

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themselves exempt from personal liability, necessarily keep themselves strictly within its provisions.

By statute, all property, real and personal, within the State, unless specially exempted, is declared liable to taxation. (1 R. S. 387, § 1.) Real estate must be assessed in the town where located, and personal property to the owner in the town where he resides when the assessment is made. (*Id.* 389, § 5.) To enable assessors to prepare a list of persons and property for taxation, these officers are vested with power and authority, between the first days of May and July in each year, to ascertain and determine the persons and property within their respective towns liable to assessment, (*Id.* 390, § 8,) then to make a record of such determination and their valuation of the property assessed, by preparing an assessment roll and having the same completed by the first day of August. This roll is to be kept for inspection until the third Tuesday of August, on which day any person assessed thereon, feeling himself aggrieved thereby, may make his complaint to said assessors, and they are then authorized to reduce such valuation, or strike the assessment out altogether. But the power of review, or modification, does not extend to assessments against which no complaint is made; as to non-complainants, the roll as completed on the first day of August, is final, as to persons, property and valuation. Inferior jurisdictions, deriving their powers wholly from the statute, have not authority to reverse, modify or reconsider their own judicial action. (*People v. Sup. of Schenectady*, 35 Barb. 408.)

The persons and property to be assessed must be determined by the assessors before the first day of July in each year. After that date assessors have no jurisdiction to add names or property; and after the first day of August, have no power to strike from the roll, except as authorized on the day of review. In this view, persons or property coming into a town after the first day

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of July, or property acquired, or lost, after that date, by residents, cannot legally be added to, or stricken from, the roll by the assessors. If real or personal property liable to assessment on the first day of July, be overlooked or omitted from the roll by the assessors, power is given to the board of supervisors to put the same upon the roll, on the application of the assessors, for taxation for the current year; (*Laws of 1865, p. 18;*) a legislative construction that such power did not rest with the assessors. It was the determination of the Court of Appeals, (*Mygatt v. Washburn, 15 N. Y. 316,*) that the persons and property to be assessed should be determined by the assessors before the first day of July in each year. In that case, Denio, J., said: "In my opinion, the assessment should be considered as made * * * on the first day of July. If there is any change of residence, or ownership of property, after that day, it does not affect the assessment roll. The inquiries are then completed. Any change which the assessors are authorized to make after that time, are such as may be required to correct mistakes. When the statute speaks of the time when the assessment is to be made, it refers to the binding and conclusive act which designates the tax-payers and the taxable property."

In this case the defendants exercised the power devolved upon them, as assessors of the town of Canton, in the months of May and June, and adjudged the plaintiff as liable to assessment for the year 1868, for real property only. With this their power and authority to determine assessments for the current year was exhausted. So, too, before the assessment complained of was made, the time had elapsed in which assessors were empowered to determine who, and what property, should be assessed. In either case the assessors were without authority to make the assessment complained of, and the act was tortious.

I do not deem it important to examine the question of the plaintiff's residence at the time the assessment was

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made; nor the other question, that the property assessed was acquired after the first day of July. Either would probably be fatal to the defense.

The case is put on the distinct ground of want of authority and jurisdiction: 1st. Because the authority of the assessors had been exhausted; and, 2d. Because the time in which the assessors had authority to determine and assess persons and property, had expired, before the assessment in question was made.

In this view, the evidence excluded was wholly immaterial, and had no bearing on the questions decided.

In my opinion, a verdict was properly directed for the plaintiff, and a new trial properly refused.

Judgment affirmed.

[THIRD DEPARTMENT, GENERAL TERM, at Albany, February 7, 1871.
Miller, P. J., and Parker and James, Justices.]

BAKER vs. BYRNE and others.

The owners of a vessel are not bound to close the hatches, at night, so as to protect from injury a trespasser, or one who has no right or license to be upon the vessel.

The principle on which owners of property are liable for acts of negligence in the use thereof, is that they are in duty bound to keep their property in such a condition that persons who are lawfully on the premises shall not be injured; but it does not extend to those who are on the premises of others without right, or without permission.

APPEAL by the plaintiff from a judgment dismissing the complaint, and from an order denying a motion for a new trial.

This action was brought by the plaintiff to recover damages for an injury suffered by him from falling down a hatchway of the barge *Pilgrim*. It was admitted by the

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defense that the barge was owned by the defendant George C. Byrne. The accident occurred at Jersey City, N. J., in August, 1863. The plaintiff was then mate, and in charge of the steamer *Oriole*. At the time of the injury, there was next to the dock, in Jersey City, a steamer named *Carnac*. The barge *Pilgrim* was lying next to the *Carnac*, and the *Oriole* was lying outside of and next to the *Pilgrim*. The evidence showed that there was no way of getting on board of the *Oriole* except by going over the *Carnac* and *Pilgrim*; unless it was by means of a small boat.

The plaintiff had been going over the *Carnac* and *Pilgrim* to get to his own boat for a day or two previous to the accident. The accident occurred at about 9 o'clock in the evening of August 23. That evening was dark, and the upper deck of the *Pilgrim* a little wet and slippery, and the plaintiff went from the upper deck to the main deck of the *Pilgrim* to pass over to his own boat. The hatchways on board the *Pilgrim* were on the main deck. The plaintiff had usually gone over the upper deck of the *Pilgrim*, and in doing so would not have observed the hatchways. On the evening in question, the hatchways of the *Pilgrim* had been left open, and the plaintiff fell through one of them, and thereby had his hip dislocated or very much injured.

The defense was a general denial, and a specific denial of any negligence in respect to the hatchways or any other part of the *Pilgrim*.

The action was tried before the Hon. ALBERT CARDOZO and a jury. The evidence was conclusive as to the accident, and its consequences. After the testimony on the part of the plaintiff was closed, the defendants moved to dismiss the complaint, for the following reasons: 1st. The plaintiff was a trespasser on board of the defendants' boat. 2d. There was no license shown for him to be there, either express or implied. 3d. There was no proof of a custom

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permitting the plaintiff to be there, under the circumstances disclosed in this action. 4th The plaintiff was not entitled to a way over the defendants' boat, as a matter of necessity. 5th. The defendants were not under any duty to the plaintiff to keep their hatches closed; the plaintiff was not their servant, and if he had been, and was injured by the negligence of his co-servants, he could not recover. 6th. The plaintiff's negligence contributed to, and actually produced the injury. The court granted the motion; assigning these reasons: "I have no doubt the plaintiff was a trespasser; he had no license to go on board this barge; there is no proof that on the previous occasions, when he traversed that boat, he did so with the knowledge of anybody; the proof is, he never saw anybody there; he had no license from anybody who had the right to control the barge; he went on board when it was dark, and whether there was negligence on board of the boat or not, is of no importance, as he had no right to be there; he brought the misfortune on himself, and the defendants are not responsible for it." The complaint was therefore dismissed, and the plaintiff's counsel excepted.

Wm. A. Coursen, for the appellant.

I. Hatchways of vessels at docks invariably have covers, which covers are always put on in the evening, when the work is finished. This accident occurred on a Sunday, at 9 o'clock in the evening, when no work had been done during the day. The plaintiff had a right to assume that the hatchways of the *Pilgrim* were closed, and that no accident could occur from negligence in that respect.

II. There is an implied license to all vessels to fasten to all docks upon or adjacent to navigable waters. That doctrine is clearly established in the case of *Heaney v. Heaney*, (2 Denio, 625.) The court will take notice that Jersey City is upon navigable waters, and that the docks are

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open to the use of all vessels, unless expressly prohibited, (of which there is no pretense in regard to the *Oriole*, at the time above mentioned.)

III. The court should have taken judicial notice of the universal custom for parties to go over the deck of one vessel to get to another vessel, when both are lying by the same dock. This custom is one prevailing in every part of the mercantile world, and the court will recognize it as fully as the right or custom of any person to walk on the sidewalks of our streets. (*Sleight v. Hartshorne*, 2 John. 531, &c., particularly 541. *Browne v. Scofield*, 8 Barb. 239.) In this case the testimony is clear that there was no way of reaching the deck of the plaintiff's vessel except by going over the deck of the *Pilgrim*. This court is well aware of the general usage, by which a vessel attached to a vessel next a dock, is always approached by parties going over the vessel at the dock. It seems idle to say that the passengers who, in going from a vessel to the dock, go across the deck of another vessel fastened to that dock (or the deck of an intermediate vessel) are or can be in anywise considered trespassers.

IV. If it were possible to regard the plaintiff, under the circumstances, as in any degree a technical trespasser, yet he is entitled to recover in this action. There is no suggestion or pretense that the plaintiff went on board of the *Pilgrim* for any unlawful purpose; he was merely on his (and the only) way to his own boat; there was no negligence whatever on his own part; he was a sailor, and knew (or had a right to suppose) that the hatchways of the *Pilgrim* were closed—he knew that the invariable custom of vessels was to put on the hatchways in the evenings, and as the accident was on a Sunday, the plaintiff walked on over the deck of the *Pilgrim* with the same confident feeling of security that he would have had on the deck of his own vessel. Even if without a semblance of right, he had gone on the deck of the *Pilgrim*, he had an undeniable

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legal right to feel free from such a danger and injury as he encountered. The defendants were negligent in the highest degree, in leaving open at night the hatchways of their vessel, and, as in the case of spring guns or ferocious dogs, kept upon the premises, the defendants should respond for any injury occasioned by their gross carelessness and negligence. We claim, that if the accident had occurred to the plaintiff whilst merely straying over the *Pilgrim*, the defendants would be liable. (*Bird v. Holbrook*, 4 Bing. 628, 15 Eng. Com. Law, 91. *Loomis v. Terry*, 17 Wend. 496, 501, N. Y. Transcript, January 8, 1869. *Driscoll v. Newark and Riverdale Stone and Cement Co.*, N. Y. Ct. of Appeals, January 1, 1868. *Birge v. Gardiner*, 19 Conn. 507. *Kerwhacker v. Cleveland, C. and C. R. R.*, 3 Ohio, 172. *Lynch v. Nurdin*, 1 Ad. & E. 30, a.) This last case sustains the view now generally adopted in our courts, that even when there be some degree of negligence (comparatively excusable) on the part of the plaintiff, yet he shall recover in an action where the negligence of the defendant is absolutely without excuse, as was the negligence of the defendants in the case now before the court. (*Redfield on Railways*, 330, § 2, 331, § 4, 394, 395. *Althorf v. Wolfe*, 22 N. Y. 355, 364. *Pierrit v. Moller*, 3 E. D. Smith, 574.)

Ira Shafer, for the respondents.

I. The plaintiff was a trespasser when crossing the defendants' boat, and he crossed the same at his peril. Trespass could have been maintained against him, and at least nominal damages recovered. (*Wells v. Howell*, 19 John. 385.) And he could not maintain an action for injuries sustained while thus crossing. (*Bush v. Brainard*, 1 Cowen, 78, and cases cited.) The court says: "But in all cases where damages are sustained by the plaintiff, in consequence of the use which the defendant makes of his own property, it is necessary to inquire, not only whether the

defendant has been guilty of culpable negligence on his part, but whether the plaintiff is free from a similar charge. In the case of *Blyth v. Topham*, (*Cro. Jac.* 158,) the defendant digged a pit in a common, and the plaintiff's mare being straying there, fell into the pit and perished. The court held that no action lay, because the plaintiff, showing no right why his mare should be in the common, the digging of the pit was lawful as against him. His loss was, therefore, *damnum absque injuria*. Otherwise, had he digged the pit in the highway. (*Roll. Ab.*, 88 *Co. Litt.*, 56, a.) In *Townsend v. Wathen*, (9 *East*, 277,) the defendant set traps in his uninclosed wood, which was intersected by highways and paths. The plaintiff's dogs were caught in the traps and injured, for which he recovered. Chief Justice Ellenborough places the defendant's liability on the fact that the traps were set and baited with strong-scented meats, so near the plaintiff's yard, where his dogs were kept, that they might scent the bait without trespassing on the plaintiff's wood. And he asks what difference there is, in reason, between drawing the animal into the trap, by means of his instinct, which he cannot resist, and putting him there by manual force? In *Clark v. Foot*, (8 *John.* 421,) the court says: "It is lawful for a person to burn his fallow, and if his neighbor is injured thereby, he will have a remedy, if there be sufficient ground to impute the act to the negligence or misconduct of the defendant." And in *Wells v. Howell*, (19 *John.* 385,) it was decided that the owner of an uninclosed field may maintain trespass against the owner of a horse grazing there, unless the defendant show a right to permit his cattle to go at large."

II. There is no pretense he was entitled to be there by virtue of any custom. The cases of *Hinton v. Locke*, (5 *Hill*, 437,) and *Sleight v. Hartshorne*, (2 *John.* 531,) much relied upon by the plaintiff, does not sustain him.

III. If he had been a servant of the defendants, and an injury had resulted from the negligence of the defendants'

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servants in not closing the hatches, the plaintiff could not recover. (*Brown v. Maxwell*, 6 *Hill*, 592.) In such a case he would take the risk of the common employment. (*Wright v. N. Y. Central R. R. Co.*, 25 *N. Y.* 562.)

IV. The plaintiff was not the servant of the defendants, and they were not under any duty to him. (*Seymour v. Maddox*, 71 *Eng. C. L.* 326.) *Ryan v. Fowler*, (24 *N. Y.* 410,) modifying this case, is the strongest case in favor of servants, to be found in the books. (*Roulston v. Clark*, 3 *E. D. Smith*, 366. *Carolus v. The Mayor*, 6 *Bosw.* 15. *Blake v. Ferris*, 1 *Seld.* 48.)

V. There is no pretense of a private right of way, nor a public right of way; nor of a license, either express or implied.

VI. There is no pretense, even if there was a license to cross, that that would entitle the plaintiff to recover, or that it imposed upon the defendants any duties. It would simply protect the plaintiff from an action of trespass, until revoked. (*Miller v. Auburn and Syr. R. R. Co.*, 6 *Hill*, 61.)

VII. There is no pretense that he had any right to cross over by reason of any contract between the parties.

VIII. Clearly and undisputably the plaintiff was negligent, upon his own theory.

IX. There is no such thing as a right of way by necessity. That right exists as against a grantor in favor of the grantee of land, whereby the grantor has no other way or mode of ingress or egress.

X. The cases cited by the plaintiff at special term do not touch the questions involved in this case. In *Birge v. Gardiner*, (19 *Conn.* 507,) the plaintiff was an infant accustomed to pass through the defendant's gate, which was so carelessly hung as to fall upon the plaintiff, an infant of six years of age. *Lynch v. Burden*, (1 *Adol. & Ell.* 30,) is to the same effect. These cases are the leading ones relied upon by the plaintiff.

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By the Court, INGRAHAM, P. J. The plaintiff, when crossing the defendant's vessel, had no right or license to be there, and the defendants owed him no duty which threw on them the obligation to close the hatches of their vessel at night, so as to protect a trespasser from injury.

The principle on which persons are held liable for such acts, is that they are in duty bound to keep their property in such a condition that persons who are lawfully there shall not be injured; but it does not extend to persons on the defendant's premises without right, or without permission.

The cases in 3 *E. D. Smith*, 366; 1 *Cowen* 78, and 1 *Hilton*, 425, are cases exemplifying this rule.

Judgment affirmed.

[FIRST DEPARTMENT, GENERAL TERM, at New York, February 7, 1871.
Ingraham, P. J., and *Geo. G. Barnard*, Justice.]

MERRIAM and others vs. KELLOGG and others.

A complaint alleged a sale of stock; by the plaintiffs to the defendants, at a specified price, deliverable at the option of the buyers, within four days. It averred that the buyers did not exercise that option, and that a tender of the stock was made to the defendants, on the fourth day, and payment demanded and refused. It also averred that the price of stock, on the day when it was tendered, was \$87 per share, being \$21 per share less than the contract price; and that the defendants had not paid for the stock. *Held*, on demurrer, that the plaintiffs had their election either to tender the stock and demand payment, and then sue for the purchase money, treating the property as belonging to the purchasers, or to keep the property, and sue for damages for breach of the contract.

Where the article agreed to be sold is stock, it is not necessary to sell it, in order to ascertain its value; and if the value of the stock can be ascertained daily, without a sale, a sale becomes unnecessary.

To enable vendors of stock deliverable at the buyer's option within a specified

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time, to recover the value, of the buyer, on a failure to perform, an averment of tender and demand of payment is sufficient. They need not aver that they kept the stock, and were ready to deliver it.

A PPEAL by the plaintiffs from a judgment sustaining a demurrer to the complaint.

The complaint alleged that at the various times therein mentioned, and during the whole of the month of September, 1863, the plaintiff Clinton L. Merriam and one William J. Bell were copartners doing business as stock brokers in the city of New York under the firm name of Merriam & Bell. That at and during said times the defendants were copartners doing business as stock brokers in said city, under the firm name of Jerome, Kellogg & Co. That on the 1st day of September, 1863, the said firm of Merriam & Bell sold to the said firm of Jerome, Kellogg & Co., twelve hundred shares of the stock of the Michigan Southern Railroad Company, said company being a company incorporated under the laws of the State of Michigan, and said stock being commonly called and known as Michigan Southern, at the price of \$108 per share, deliverable at buyer's option in three days, to wit, on or before the 4th day of September, 1863. That said Jerome, Kellogg & Co. did not exercise their option to demand, take or receive said stock, prior to the said 4th day of September, 1863; and on said day Merriam & Bell duly tendered said twelve hundred shares of said stock to Jerome, Kellogg & Co., and demanded payment therefor, and said Jerome, Kellogg & Co. refused to receive and pay for the said stock; to the great damage of said Merriam & Bell, in the sum of \$25,200, besides interest from September 4th, 1863. That the price of said stock, on said 4th day of September, 1863, was \$87 per share. The plaintiffs further alleged that William J. Bell was, on or about the 6th day of July, 1868, duly adjudged a bankrupt, and on or about the 16th day of December, 1868, the plaintiff Charles H. Oley, was duly appointed assignee

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in bankruptcy of his estate, and, as such assignee, he has succeeded to all the rights and interests of the said William J. Bell therein. That said defendants have never paid for the said stock, nor for any part thereof, but are still justly indebted therefor as aforesaid. Wherefore, the plaintiffs demanded judgment against the defendants, for the difference between the price so agreed to be paid for said stock and the price of said stock on the 4th day of September, 1863, when the defendants agreed to receive and pay for the same, together with interest thereon from the 4th day of September, 1863, besides costs.

The defendants demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. And after argument, the court, at special term, ordered judgment for the defendants, against the plaintiffs, upon the demurrer, with costs.

James S. Merriam, for the plaintiffs.

Wm. Henry Anthon, for the defendants.

By the Court, INGRAHAM, P. J. The complaint in this case alleged a sale of stock by the plaintiffs to the defendants, at a specified price, deliverable at the option of the buyers within four days. It also averred that the buyers did not exercise that option, and alleged a tender of the stock, on the fourth day, to the defendants, and a demand of payment, which was refused. It also averred that the price of stock on the day when it was tendered, was \$87 per share, being \$21 per share less than the contract price, and that the defendants had not paid for the stock. The defendants demurred to the complaint, on the ground that the same did not state any cause of action. Judgment was rendered for the defendants, on the demurrer. The plaintiffs have their election either to tender the property and demand payment, and then sue for the purchase

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money, treating the property as belonging to the vendee, or to keep the property and sue for damages for breach of the contract. (*Bement v. Smith*, 15 Wend. 493.) The chief justice says an averment of a tender of the article sold, by the plaintiff, and a refusal of the defendant to receive it, would have been sufficient; and if so, it seems rather technical to turn the plaintiff out of court when he has proved all that was necessary to sustain his action.

The defendants seek to sustain this judgment upon the ground that the plaintiffs should have averred a sale, and then recovered the difference. It is not necessary to decide whether it was necessary to sell the article before a recovery of damages could be had, because the complaint shows a good cause of action for the contract price. Where the article agreed to be sold is stock, it is not necessary to sell it in order to ascertain its value; and if the value of the stock can be ascertained daily, without a sale, a sale becomes unnecessary.

The defendants claim that, for the purpose of recovering the value of the stock from them, the plaintiffs should aver that they had kept the stock, and were ready to deliver it. That is not a necessary averment. In *Hagar v. King*, (38 Barb. 209,) SMITH, J., says: "As the action is brought upon the contract for the purchase of the bonds, the plaintiffs were bound to prove a tender at the time specified in the contract, and having done so, they would not be bound to prove that they kept them for the defendant. Upon the trial they might have been required to have them ready for delivery."

There is a class of cases in which the plaintiff suing on such a contract has been allowed to prove a resale of the property, so as to charge the vendee with the difference. Such a case is *Pollen v. Le Roy*, (30 N. Y. 549;) and *Lewis v. Greider*, (49 Barb. 606,) is another. In those cases the question was whether the resale could be justified, for the

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purpose of fixing the amount of damages, and not as necessary to the plaintiff's recovery.

It is not necessary to discuss this question, as the complaint shows a good cause of action to recover the contract price of the stock sold.

The judgment should be reversed, and judgment ordered for the plaintiffs on demurrer, with leave to the defendants to answer, on payment of costs.

[FIRST DEPARTMENT, GENERAL TERM, at New York, February 7, 1871.
Ingraham, P. J., and Geo. G. Barnard, Justice.]

CLANCY vs. BYRNE.

A pier, like any other public place, must be kept in repair; and if it is not, and damage ensues, the party whose duty it is to keep it in repair is liable for his negligence. But if persons using such pier know that it is unsafe for use, and with that knowledge use it, and sustain loss, the doctrine that one who contributes to an injury cannot recover damages for such injury, applies.

Where it appears, in such a case, from the plaintiff's own testimony, that he was aware that the pier was out of repair, and in a dangerous condition, and yet he directed his horse to be driven on to it, the question whether the plaintiff's own negligence contributed to an injury sustained by the horse should be submitted to the jury, with instructions that if it did, the plaintiff cannot recover.

THIS action was brought to recover the value of a horse, which was injured by falling through a pier, of which the defendant was lessee. It was tried at the circuit, before Justice SUTHERLAND and a jury. The following facts were established at the trial: The defendant took a lease, from one Rhinelander, of "the wharf property, in the city of New York, known as the 'Jay Street Basin,' comprising the north side of the pier, foot of Jay street, and the south side of the pier, foot of Harrison street, and the

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bulkhead between said piers," for five years from the 1st of May, 1860. He was bound to make "all the ordinary repairs to the premises, such as replacing spring piles, patching the worn surfaces, &c., and was to be responsible for any and all damages or loss that should happen through default on his part." "In case any repairs of an extraordinary nature should be required, such as replanking or sheathing the whole surface, Rhinelander might cause them to be done without being liable for any reduction or deduction of rent." The surface of the pier was in a bad condition. This fact was abundantly shown. Indeed, there was no dispute about it. The pier appeared to be safe on the surface, but it was rotten.

The plaintiff was a truckman, and owned several horses and trucks. He sent his man, with a horse and truck, down to this pier, about the middle of June, 1865, on business. The man had unloaded, and was driving off the pier. While passing where truckmen usually drive, the horse fell through the surface of the pier and broke his leg. It was rendered useless, and the plaintiff obtained a permit from the proper authorities to kill him. His value was proved to be about \$350.

At the close of the plaintiff's testimony, the defendant moved to dismiss the complaint, on the following grounds: 1st. Because the plaintiff shows that he was guilty of negligence in going upon this pier when he knew it was in a dangerous condition. 2d. There is no proof that Rhinelander had any title to that pier, or was under any obligation to keep it in repair. 3d. That whatever obligations were assumed by Byrne, were simply to make ordinary patching repairs, and that the extraordinary repairing, such as replanking and resheathing, were to be made by the landlord. 4th. That the damage in this case resulted from an omission on the part of the landlord to replank and resheath. 5th. That the demise in this case extended to the south side, the vertical side of the pier,

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and did not extend to the surface. 6th. That if the defendant's obligation to make ordinary repairs was violated, it was Rhinelander only that could maintain an action for the violation, and the plaintiff, not being privy to the covenants, cannot maintain an action.

The motion was denied, and the defendant's counsel excepted.

The jury rendered a verdict for the plaintiff for \$351.62.

The court directed that the defendant have thirty days to make a case and exceptions, both to be heard in the first instance at the general term, and that all proceedings on the part of the plaintiff be stayed.

John L. Hill, for the plaintiff.

Dayton & Todd, for the defendant.

By the Court, INGRAHAM, P. J. In this case the plaintiff has recovered against the defendant damages for the loss of a horse by breaking through the planking on a pier, and thereby injuring the horse so that he was killed. Upon the trial, the plaintiff was examined as a witness, and testified that he had known the pier for eighteen years; that it was out of repair four or five years before the accident; that he considered it dangerous for a year before that time; that it was dangerous to go on it in certain places; that it was dangerous for a horse to go on it in some places; that the whole dock was in bad repair; that the spot where the horse broke through had not been patched, and appeared in a condition worn out, to a certain extent, but appeared safe to go over on that spot; that not any of the dock appeared in good condition, and he considered the most of the pier unsafe.

The defendant requested the court to charge the jury that if they found, from the evidence, that the pier was dangerous to drive over, and the plaintiff knew it, he

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could not recover. This was refused, and the defendant excepted.

I do not see how, with this evidence from the plaintiff, the court could avoid submitting to the jury the question whether the plaintiff by his act contributed to the accident, and if he did, to instruct the jury that he could not recover. A pier, like any other public place, must be kept in repair, and if it is not, and damage ensues, the party who should keep it in repair is liable for his negligence; but if persons using such pier know that it is unsafe for use, and with that knowledge use it, and sustain loss, it seems clear that the doctrine, that one who contributes to an injury cannot recover for such injury, applies. It never could be held, that if the plaintiff had been told, at the time, that the pier would fall down if his horse went on it, and notwithstanding he persisted in driving on the pier, and it fell, he could recover for the injury. The same rule applies if it appears that the plaintiff knew it was unsafe and still used it.

The question of the plaintiff's negligence should have been submitted to the jury, and the learned justice erred in his refusal to do so.

The verdict should be set aside, and a new trial ordered; costs to abide the event.

[FIRST DEPARTMENT, GENERAL TERM, at New York, February 7, 1871. *Ingraham*, P. J., and *Cardozo* and *Geo. G. Barnard*, Justices.]

WILLIAM H. RAINEY and others, Executors &c. vs. WILLIAM LAING and others.

A testator, by the third clause of his will, gave and bequeathed to his executors the sum of \$20,000 *in trust* to invest the same and keep it invested, and from the income to pay to his brother and sister \$500 each, during their respective lives, and to pay annually the residue of the income to the general synod of the Reformed Protestant Dutch Church, to be applied to the support and education of pious, indigent young men preparing for the ministry; and upon the decease of either his said sister or brother, to pay annually the whole residue of said income, after paying \$500 annually to the survivor, to the said general synod, to be applied as before mentioned; and, upon the decease of the survivor, to pay said principal sum of \$20,000 to the said general synod, to be applied as before stated. By the fifth clause, the testator gave the residue of his estate to the said general synod "to be applied to the support and education of pious, indigent young men preparing for the gospel ministry in that church."

- Held*, 1. That so far as the fifth clause of the will was concerned, the law of trusts had no application; there being but one trust created by the will, viz. the one mentioned in the third clause, upon which there was no question, and the only relevancy of which was, so far as it tended to confirm the view that the fifth clause did not, and was not intended to, create any trust.
2. That the third clause showed that the testator was well advised as to the proper language to be employed when the bequest was to be held in trust; and that the fact of his not using similar phraseology in the fifth clause, only went to show that the devise therein mentioned was not intended by him to be construed otherwise than, by its terms, he had expressed it.
3. That the purpose avowed, in the fifth clause was, in the highest and holiest sense, both religious and charitable; and the devise was absolute in its terms; no condition whatever being imposed.
4. That as the fee vested absolutely in the synod, there could be no doubt of the validity of this provision of the will.
5. That the question whether the property, with that which the synod already held, would exceed in amount the sum to which its charter restricted it, could not be tried in an action brought by the executors, for the construction of the will. That that question was not to be determined collaterally, but only in a direct proceeding by the State.
6. That the condition imposed in the act incorporating the synod being, not against its *taking*, but against taking *and* holding, the corporation could *take*; but whether it could *hold*, was another question, not necessary or proper in this collateral way to be considered—a question purely of public policy, with which individuals had no concern, but in which the State, as the sovereign, was alone interested, and which it might either raise or waive, according to its pleasure.

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APPEAL from a judgment entered at a special term. The action was brought by the plaintiffs as executors of James B. Laing, deceased, to obtain a construction of his last will and testament. The testator died at Kinderhook, New York, on the 25th day of October, 1868. The defendants and respondents William L. Laing, a brother, Catharine E. Heermance, a sister, and Alexander K. Laing, a nephew of the deceased, are his only heirs at law, or next of kin. The deceased, by the second clause of his will, gave and bequeathed his cabinet and collection of coins, minerals, shells, &c., to Rutgers College, New Jersey. The third, fourth and fifth clauses of the will were as follows:

“Third. I give and bequeath to the executors of this my last will and testament, hereinafter nominated and appointed, or the survivors, the sum of \$20,000 in trust, and for the purposes following, that is to say, that they or the survivors invest the same in their own names in and upon real estate or any stocks, funds or other securities in the United States generally considered good and permanent, and that they keep the same so securely invested, and that from the income arising therefrom they pay \$500 annually to my sister, Catharine E. Heermance, during the period of her natural life, and that they also therefrom pay \$500 annually to my brother, William L. Laing, during the period of his natural life, and that they pay annually the residue of the said income to the general synod of the Reformed Protestant Dutch Church, to be applied to the support and education of pious, indigent young men preparing for the gospel ministry in said church, and that upon the decease of either my said sister, Catharine E. Heermance, or brother, William L. Laing, they pay annually the whole residue of said income, after paying the said \$500 annually to the survivor, to the general synod of the Reformed Protestant Dutch Church, to be applied as above mentioned, and upon the decease of the survivor

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of my said sister, Catharine E. Heermance, and brother, William L. Laing, I order and direct my executors to pay the said principal sum of \$20,000 above bequeathed to them in trust to the said general synod of the Reformed Protestant Dutch Church, to be applied to the support and education of pious, indigent young men preparing for the gospel ministry in said church, the said \$20,000 to be added to and form a part of the fund hereinafter mentioned in the devise and bequest hereinafter made of my residuary estate to the said general synod, and to be held, invested and applied for the purposes aforesaid as therein directed.

Fourth. I give and bequeath my gold watch to my friend, Henry H. Van Vleek, of the city of Hudson, in case he should survive me.

Fifth. I give and devise all the rest and residue and remainder of my estate, real and personal, of every name, nature and description whatsoever, to the general synod of the Reformed Protestant Dutch Church, to be applied to the support and education of pious, indigent young men preparing for the gospel ministry in that church, as follows: The said general synod to invest, or cause to be invested, the principal, and apply the income arising therefrom to that purpose.

It is also my will that no part of the said income arising from the estate so given as aforesaid to the said general synod, shall be applied to the support or education of any such young man until he shall have entered upon the regular course of studies in Rutgers College, in the State of New Jersey, when the said income may be so applied; and I also direct and it is my will that any sum not exceeding \$500 may be applied annually from said income to or towards the support and education of each one of such young men to whose support and education any part of said income may be applied.

And it is also my will, and I direct that the \$20,000

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hereinbefore directed to be paid to the said general synod of the Reformed Protestant Dutch Church upon the decease of the survivor of my said sister, Catharine E. Heermance, and my brother, William L. Laing, when received by the said general synod, be invested as herein directed in regard to my residuary estate, and the income arising therefrom to be applied to the support and education of pious, indigent young men preparing for the gospel ministry in said church, upon the same terms and conditions in all respects as hereinbefore directed in regard to the devise and bequest of my residuary estate, my intention being that the said \$20,000, when received by the said general synod, shall be added to the said residuary estate and form one fund, to be held and known as the "Laing fund," and only the income arising from said fund to be applied to the purposes above mentioned.

It is my request, in case any young man who shall have received aid from the aforesaid fund, shall at any time feel able to refund any of the moneys applied to his support and education from said fund, or any part thereof, that he will pay the same to the general synod, or so much as he may feel willing and able to pay back, the same to be added to the principal of the said fund, but this request is not to be considered as binding upon any one to do so."

The property left by the deceased consisted entirely of personal estate. The heirs at law and next of kin claimed that the bequests to the synod were void.

The action was tried before Justice BARNARD, at the New York special term, in March, 1870. He subsequently rendered his decision, finding the following facts:

1. That James B. Laing died at Kinderhook, in this State, on or about October 25, 1868, leaving a last will and testament which has been duly admitted to probate, and a copy of which is annexed to the complaint.
2. That he left about \$50,000 in personal property, in addition to the cabinet of minerals and watch specifically

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bequeathed ; that he left a brother and sister, William L. Laing and Catherine E. Heermance, and a nephew whose name is Alexander K. Laing, sole child of another brother who died before the testator, his only heirs at law, and next of kin, and they all reside in the State of New York.

3. That Rutgers College is a corporation, whose authority to take the bequest given to it by the testator, and the propriety of whose taking, is not questioned.

4. That the general synod of the Reformed Protestant Dutch Church, now known by the name of the Reformed Church in America, (and about the identity and certainty of which no question is raised,) was incorporated by chapter 110 of laws of 1819, (*Sess. Laws of 1819, p. 129,*) which among other things provides that the synod shall not take and hold real and personal property of the yearly value of over \$10,000, (its capacity to take and hold being upon that proviso.)

5. That the only powers conferred upon the general synod by the constitution of the Reformed Protestant Dutch Church and of the Reformed Church in America, are the following, viz: Original cognizance of all matters relating to the theological school or seminary, the appointment of professors and their course of instruction ; the appointment of superintendents of the said school and the regulation thereof ; the power of regulating and maintaining a friendly correspondence with the highest judicatories or assemblies of other religious denominations ; to constitute particular synods and to make any changes in the same ; to exercise a general superintendence over the spiritual interests and spiritual concerns of the whole church, and an appellate supervising power over the acts, proceedings and decisions of the lower assemblies relating to christian discipline or the interests of religion, and the general welfare and government of the church. That by such constitution the general synod has nothing to do

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with the pecuniary details of, or any pecuniary provision for the education of students preparing for the ministry of said church in any branch or department of such preparation, or the payment of their tuition or other expenses; or the holding, paying or dispensing of any fund or funds, or sums of money for their benefit, during such preparation, or at any other time, or for the benefit of any person or persons who have entered upon the regular course of studies at Rutgers, or at any other institution or place, or for the benefit of any person or persons whomsoever.

6. That the general synod of the Reformed Protestant Dutch Church, at the time of the death of the testator had, and the general synod of the Reformed Church in America now has, no legal connection with Rutgers College, or its officers or students.

7. That at the time of the death of the testator, Rutgers College and the Theological Seminary of the Reformed Protestant Dutch Church at New Brunswick were, and now are, entirely distinct and separate institutions.

8. That before the incorporation of the general synod of the Reformed Protestant Dutch Church, it was a mere voluntary association, and that before and at the time of such incorporation, the general synod held no fund or funds, or property of the character of the fund attempted to be created or provided, or formed in and by the third and fifth clauses of said last will and testament.

9. That at the date of the death of the testator, the synod held in perpetuity, and had permanently invested, property, real and personal, the annual value and income of which largely exceeded \$10,000 per year.

10. That the entire estate left by the testator, is in the hands of the executors named in the will, who have instituted this suit to obtain the direction of the court in the premises, and the general synod comes in by its answer and asks this court to direct the executors to hand

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over the residue in controversy. On the other hand, the above named next of kin claim it.

As matter of law, the said justice concluded that the provisions of the will were void, except those uncontroverted; and ordered judgment that the executors deliver the cabinet of minerals to Rutgers College, the watch to Mr. Van Vleck, and the balance of the estate to William L. Laing, Catherine E. Heermance and Alexander K. Laing, share and share alike; the executors, however, in the first instance to retain their commissions and expenses, and such costs and allowances as might be made in their favor, or as they might be directed to pay the other parties or attorneys in this suit.

And he further directed, in case the said executors and next of kin did not agree on a settlement of the estate, that a reference might be had thereafter on the footing of this decision; and that on receiving a final discharge and satisfaction from the next of kin, the executors should be forever discharged of and from all other or further liability, by reason of the estate so coming into their hands as executors of said will. And he directed the costs to be paid out of the estate, and the allowances therein specified.

From this judgment the defendants, the general synod of the Reformed Church, appealed.

M. S. Bidwell and *L. K. Miller*, for the plaintiffs and the general synod of the Reformed Church.

I. James B. Laing, the testator, had full capacity and right to bequeath his property in the manner mentioned in his will. He was of mature age. The absolute ownership was vested in him. He had not a parent, wife or children. The parties who oppose the bequest had no legal or meritorious claims upon him. (*Laws of 1860, ch. 360, p. 607.*)

II. There is no doubt about the testator's intentions. It is clear that it was his intention that the defendants Laing

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and Heermance should not take this property. It is equally clear that he intended that the general synod should take it, for the charitable purposes mentioned in the will.

III. The general synod had full capacity and right to take this property under this bequest. 1. They are a corporation, and as such *ipso facto* are capable of taking such a bequest. "It is incident, at common law, to every corporation, to have a capacity to take land and chattels." (2 *Kent's Com.* 281, and cases cited. 1 *Kyd. on Corp.* 69. *Angell & Ames on Corp.* 65, 2d ed.) They have capacity to take property by bequest. (*Angell & Ames on Corp.* 111, 2d ed. *In the matter of Howe*, 1 *Paige*, 214.) They had capacity to take this property by bequest, independently of the express power given by the act of incorporation. (*Sherwood v. American Bible Society*, 1 *Keyes*, 561. *Downing v. Marshall*, 23 *N. Y.* 366.) 2. They had power to take this property for religious and charitable purposes. This power was given to them in express terms by the law of the State, which created them a corporation. The bequest in question was for a religious and charitable purpose. (a.) It is intended for the benefit of indigent young men; this is clearly a charitable purpose. It is intended to be in aid of education. This, also, is a charitable purpose. "No time was ever so barbarous as to abolish learning and knowledge; nor so uncharitable as to prohibit relieving the poor." (1 *Co. R.* 26. 11 *id.* 7, 71. *Wilmet's Opinions*, 25. *Shelf. on Mortm.* 68; 20 *Law Lib. N. S.*) (b.) The bequest was also intended for the education of young men for the ministry in the Reformed Protestant Dutch Church; this is a religious purpose. The preparation of men for such a ministry, by a liberal and careful education, conduces directly to the extension and influences of religion. It appears, therefore, that before and at the time when the will was made, and at the testator's death, there was a law of the State expressly authorizing

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the general synod to take this property by bequest, and to hold it for the purposes mentioned in the will. They were also expressly authorized by the same law, to "hold" such property, and to make by-laws and regulations relating to the "management and disposition" of the property so bequeathed to them. They had, therefore, by the law of this State, full power to hold, manage and dispose of the property in the manner mentioned in the will. 3. And, therefore, if a bequest to one or more natural persons in trust for religious and charitable uses and purposes be unauthorized by law and void, yet a bequest to the general synod, of money to be appropriated to such uses and purposes, is expressly authorized by law and is clearly valid. It might be made in the very terms of the act, namely, to the general synod, "to be appropriated to religious and charitable uses and purposes, with power to make regulations relative to its management;" and in such a case the synod might lawfully appropriate it to the very purpose and in the very manner mentioned in this will. If so, then this bequest to them, which specified this purpose and manner, must be valid; the general synod would have the legal capacity and right to take such a bequest. The legislature did not think it expedient or necessary to specify the religious and charitable uses and purposes to which the property bequeathed to it should be appropriated; they left it to the sound discretion of the synod to appropriate it to any religious and charitable uses and purposes, and only required that it should be appropriated to no other uses or purposes than such as were religious and charitable, reserving to themselves the right to repeal the act of incorporation if the power thus given should be abused, or any evil result from it. The power thus given by the legislature cannot be abrogated, abridged or qualified by the court. The court, therefore, cannot require the bequest to be more particular or specific than the law, which in this case, is the act of incorporation.

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IV. This of itself is a complete answer to the objection that the bequest is void for vagueness or uncertainty in the description of the persons to be supported and educated. 1. Even if the act of incorporation had not expressly authorized a bequest for an indefinite religious and charitable use and purpose, this bequest would not have been void for uncertainty. When the trustee is named, and the purpose is charitable, the bequest is valid, although the testator gives it to the trustee to apply it to a charitable use in any manner he may see fit, or to select as objects of charity any persons he may choose. (*Rex v. Clifton upon Dunsmore*, 1 *Bur. Sett. Ca.* 697. *Horde v. Earl of Suffolk*, 2 *M. & K.* 59. *Shelf. on Mortm.* 524, 525, 529, [21 *Law Lib. N. S.*] *Hill on Trustees*, 80, 81. *Lewin on Trusts*, 542, [81 *Law Lib. N. S.*] *Townsend v. Canes*, 3 *Hare*, 257. 8 *Jurist*, 104.) 2. If the particular persons to be thus supported and educated had been named or designated, so that (in the language of the judge at special term) they could come into court and ask the enforcement of the trust, it would not have been a gift to a religious or charitable use; it would have been a mere ordinary private trust, like any other case between trustee and *cestui que trust*. (*Levy v. Levy*, 33 *N. Y.* 97. *Beekman v. Bonsor*, 23 *id.* 308.) In this bequest the beneficiaries are necessarily to be selected by the general synod, who are the persons to apply the income arising from the fund, to the support and education of pious indigent young men, and who are therefore to determine to what persons, answering that description, it is to be applied. (*Griffith v. Graham*, (1 *Hawks*, 130, 131.) In the case of *Inglis v. The Sailors' Snug Harbor*, (3 *Pet.* 99,) the beneficiaries were as uncertain as in this bequest, but the decree was held valid. As property to a vast amount in value has ever since been held undisturbed under that decision, and as it was made by the highest tribunal in the land, its authority must be held conclusive.

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V. Another objection to the bequest is, that it creates a perpetuity; but this is a mistake, it creates no perpetuity at all. The general synod are the sole owners of the property; no one else has any right to it, present or future, vested or contingent. On the death of the testator, this property vested absolutely in the general synod, and is not likely to be divested by any event or contingency whatsoever. The general synod is, therefore, the absolute owner of the property, and the ownership is not suspended at all by any limitation or condition whatever; and, therefore, the bequest is not contrary to law. (1 *R. S.* 773, § 1.) The direction that the property shall be appropriated forever to a particular object, or in a particular manner, is not a "limitation" or "condition." There is no forfeiture or gift. Even if the general synod does not comply with this direction, (*Newton v. Reid*, 4 *Sim.* 141; 2 *Madd. Ch. Pr.* 38;) and even if it constitutes a trust or imposes a duty which the general synod may be deemed to undertake by accepting the bequest, yet that will create no suspension of the ownership, although a court of equity, on an information filed by the attorney-general, may perhaps, in such a case, exercise a control over the synod. (*Owens v. Missionary Society*, 14 *N. Y.* 381, 404. *Griffith v. Graham*, 1 *Hawks*, 133, 134.) In general, when charitable trusts are created, the fund is intended to be, and is a permanent fund, a fund to be held for an indefinite period, and the income alone to be used, yet as the absolute ownership is not thereby "suspended by any condition or limitation whatever," such permanency is not unlawful. Accordingly it is settled, that the property in such cases is not inalienable. There is not "positive law restraining the alienation of estates given for charitable purposes; the trustees in whom such estates are vested may, at law, make an absolute disposition, but if it be improvident or injurious to the interests of the charity, the transaction will be set aside in a court of equity, as a breach of trust."

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(*Shelf. on Mortm.* 686, [21 *Law Lib., N. S.*] *Atty. General v. Hungerford*, 2 *Clark & Fin.* 357, 374. *S. C.*, 1 *Bli., N. S.*, 457. *Atty. General v. Warren*, 2 *Swans.* 291, 302. *S. C.*, 1 *Wils. Ch. C.* 387. *Levy v. Levy*, 33 *N. Y.* 97, 117. *Griffin v. Graham*, 1 *Hawks*, 96, 130, 132.) But in truth the question is not open for argument. The case of *Williams v. Williams*, (4 *Seld.* 525,) is a conclusive adjudication on this precise point. In that case there were two bequests, one to the trustees of the Presbyterian church in Huntington and their successors, in trust for the support of a minister, the principal to be loaned, and the income alone to be used; the other was given to certain unincorporated trustees and their successors, for the education of the poor. Both of these bequests were held 'valid.' And although the case has been much criticised, and as the latter bequest has been disputed, yet, as in the first, which created a perpetuity as much as the bequest of the general synod, the decision has never been questioned, and has repeatedly been recognized and approved. (*Bascom v. Albertson*, 34 *N. Y.* 584-599. *Theo. Sem. v. Kellogg*, 16 *id.* 83. 23 *id.* 308, 309.) If any principle or rule of law has been established in our courts by authority, certainly this rule, that such a bequest creates no illegal perpetuity, is settled beyond dispute. The case of *Inglis v. The Sailors' Snug Harbor*, (3 *Pet.* 126,) is also an authoritative decision to the same effect. And in conformity with these views, Wright, J., in *Levy v. Levy*, (33 *N. Y.* 117,) uses the following language: "Nor do our statutes against perpetuities interfere. Our rule and statute against perpetuities only requires that the whole interest shall be vested, and not contingent. A vested gift to a charitable corporation is not within the rule."

VI. Another objection to the bequest was, that it does not appear that there will be any pious, indigent young men, &c. The same objection might have been made in the case of *Inglis v. The Sailors' Snug Harbor*, (3 *Pet.* 126,) and in *Amherst Academy v. Cows*, (6 *Pick.* 427,) and in

almost every other appropriation to a charitable purpose, and hardly deserves serious consideration. When it is ascertained that no beneficiaries can be found, it may be considered what the effect of such a marvelous and unprecedented lack of candidates for the charity will be. This objection will appear to be peculiarly uncalled for, when it is considered that an offer on the part of the synod, of the best evidence on the subject of which the nature of the case admitted, was rejected. It is said by the learned judge, that "the law has not fixed a certain definition of piety or indigence, and cannot entertain controversies upon such questions." The answer is, that this is a question of fact, not one of law, and the learned judge has in the very next sentence answered the objection, when he says that "the testator intended to commit the determination of these questions to the discretion of a trustee;" he adds that the trustee is incompetent to act; but that is shown to be an error.

VII. It is objected that the general synod, at the death of the testator, owned property of greater yearly value than \$10,000, and therefore, that the bequest to them was void. To this objection there are several answers. 1. The property owned by the general synod did not exceed the specified amount. The proposition involves principles of law, as well as facts. (a.) The property should be estimated according to its value in coin, and not in any government or other notes. The legal tender act, (if it be constitutional,) applies only to the payment of debts. It declares that the notes issued by the government under that act shall be received in payment of debts, (with certain exceptions,) but it is not declared that these notes shall be a standard of value. It is not, and does not purport to be of any power or effect in any other case, or for any other purpose. Moreover, it has no application to debts or obligations incurred or imposed before the date of the act;

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and, upon the same principle, it can have no application to the powers of the general synod under an act of the legislature of much earlier date. (*Hepburn v. Griswold*, *Am. Law Reg. for March*, 1870, p. 175, and cases cited.) Therefore, the property in this case is to be estimated, not according to the value of a fluctuating and depreciated paper money in circulation, whether issued by the government or by corporations, but by a standard of intrinsic and universal value. If the legal tender act were not in existence it would not be pretended that the property was to be estimated by any other standard than its value in coin. To insist that it should be determined according to its value in government bills is no more maintainable than it would have been in old times to claim that it should be estimated by its value in the old continental paper money. The legal tender act has no application to the matters involved in this case. (b.) The property held in Michigan and New Jersey, under special laws of those States, must be excluded from consideration. They are in the nature of distinct corporations. (*Ohio and Miss. R. R. Co. v. Wheeler*, 1 Black, 286, 297. *Racine and Miss. R. R. Co. v. Farmers' Loan and Trust Co.*, 49 Ill. 331, 348, 349.) That property is not held under the law of this State. It was not the intention of the Legislature of this State to prohibit the corporation they created from holding property in another State, whether it is deemed directly the same or a different corporation. In fact this property must be deemed to be of no pecuniary value to this corporation. There was no evidence that it was of any value; for all that appears, it may be a *damnosa hereditas*, a source of endless expense. (c.) The funds known as the Van Benchoten fund and the Knox fund should also be excluded from consideration, as neither of them belongs to the general synod, each of them being vested in certain trustees, not in the general synod. (d.) The funds for special objects, of which the general synod are only the custodians, should also be excluded

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from consideration, as these funds are not the property of the general synod. (*Atty. General v. Munby*, 1 *Mer.* 327. *Shelford on Mortm.* 250. 2 *Pow. on Devises by Jarmin*, 17, [5 *Law Library, N. S.*] *Hill on Trustees*, 458, last ed.) (e.) The annual value is to be such a per centage of the gross value as may reasonably be expected, over and above all expenses, losses, &c., to produce *communibus annis*, the clear net sum of \$10,000, after making allowances for loss of interest, &c., when waiting for investment. The court is sometimes called upon to determine the question when a fund is to be set apart to secure an annuity. And it has been decided in this court in the case of *Forest et al. ex'rs. v. Fanshaw*, that in such a case a fund should be set apart which at the rate of not more than four per cent per annum would produce the required annuity. In *Williamson v. Williamson*, (6 *Paige*, 298,) five per cent seems to have been fixed as a proper rule. According to these decisions, the general synod could hold property to the amount of \$250,000, or at least \$200,000 in gold, without exceeding the amount named in the act of incorporation. The evidence shows clearly that the property held by them was not so much. 2. The proviso with regard to the annual value of the property to be held by the general synod is merely directory. This is evident both on principle and authority. (a.) Non-compliance with it could do no wrong to any individual. It was not enacted, therefore, as a measure of justice between man and man, or for the protection of the rights or property of any individual. (b.) Non-compliance is not a crime—an act to be punished. (c.) It is not declared what consequences shall follow from non-compliance. (*Newton v. Reid*, 4 *Sim.* 141; 2 *Madd. Ch. Pr.* 138.) It is not declared that the conveyance or gift of property beyond the prescribed amount shall be void, *ipso facto*, or that the property shall escheat or be forfeited to the State or to any body, public or private, in such a case, or that any penalty shall be incurred for such

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non-compliance. In a word, no consequences whatever are denounced against a non-compliance. The proviso is, therefore, a mere direction, or, in the language of Sir Edward Cole, is only declaratory, in the same manner as when a charter restricted a corporation from aliening but in a certain form; it was held that this was an ordinance testifying the king's desire, but it was but a precept, and doth not bind in law. (*The case of Sutton's Hospital*, 10 Co. R. 30, b.) So the proviso in the charter of the general synod, although it may testify the desire of the legislature, does not bind in law. (d.) There are obvious reasons why the legislature might not choose to make it obligatory. One is the progressive and continual deterioration in the value of money, and the constant necessity for an increase of the amount to be allowed. \$10,000 in 1870 is not by any means of as much value as the same sum was in 1819. (*The case of Miford School*, 8 Co. R. 131, a. *Humbert v. Trinity Church*, 24 Wend. 629, 630.) (e.) Another reason is the consideration that, if the law had been obligatory, much embarrassment and difficulty might arise if the corporation, not owning the prescribed amount, should recover a donation of property, as for instance, a house and land, much exceeding the deficiency; in which case a very doubtful and difficult question would be presented as to the legal effect of such a donation. (f.) It is well known that if land increased in value beyond the prescribed amount, by good husbandry or other improvements, or any casual or unforeseen circumstance, the corporation could hold it; and no good reason can be given why any more evil would result from acquiring such an additional amount by charitable donations. (2 Conk. on Ins. 722. 2 Kent's Com. 283, b. *Humbert v. Trinity Church*, 24 Wend. 629, 630. *Bogardus v. Trinity Church*, 4 Sandf. Ch. 634, 738.) Besides, as the legislature reserved a right to make any alterations in the charter, or to repeal it altogether at any time, there was no necessity for making the proviso

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obligatory; although it was proper to introduce it as a guide to the general synod, to direct them rather than to limit and confine them rigidly in the acquisition and disposition of property. (*Chester Glass Co. v. Dewey*, 16 Mass. 94, 102.) (g.) There could have been no fear that there would be any danger of great accumulation of property by donations for mere religious and charitable purposes. (h.) To construe a law as directory, is neither unreasonable nor uncommon. The principle was asserted in the case of *Sutton's Hospital*, (10 Co. R. 30, b,) already quoted, and has been often acted upon since. (*Rex v. Inhabitants of Birmingham*, 8 B. & C. 29, 35. *The King v. Inhabitants of St. Gregory*, 2 Add. & El. 99. *Foot v. Prowse*, 1 Strange, 625. *The Banks v. Poitiaux*, 3 Rand. 136, 142. *The People v. Supervisors of Ulster*, 34 N. Y. 268, 272. *Dawson v. The People*, 25 id. 399-406.) (i.) It is submitted that in no case has a conveyance or gift been held void on such a ground. This of itself tends strongly to prove that this proviso is merely directory. (k.) Another very strong argument to prove it to be merely directory is deducible from the marked difference between this law and the law forbidding a devise to an alien, (2 R. S., § 4,) which is in these words: "Every devise of any interest in real property to a person who at the time of the death of the testator shall be an alien, shall be void. The interest so devised shall descend to the heirs of the testator; if there be no such heirs competent to take, it shall pass under his will to the residuary devisees if any there be to take such interest." Can it reasonably be believed that if the legislature intended a conveyance or gift to this corporation increasing this property beyond the prescribed amount should be void, they would not have declared it to be void, as well as declared who should in such case take the excess? (l.) Again, if a man should convey property by deed to the general synod, in excess of such prescribed

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amount, would his deed be void? Could he, in the face of his deed, recover the property from the corporation? And if he could not, could his devisees or heirs, if it were realty, or his legatees or next of kin, if it were personalty? And why, if he bequeaths it, instead of conveying it while living, can they recover it? Upon what rational ground is the law any more binding in the one case than in the other? (*See Chester Glass Co. v. Dewey*, 16 *Mass.* 94-102.)

3. If, however, the law be not deemed directory, it does not necessarily follow that the bequest is void. Under a liberal, or at least an equitable construction of the laws of 1848 and 1860, respecting gifts to charitable associations, &c., the bequest may be, and ought to be upheld. (*Laws of 1848*, ch. 319, p. 448, § 6. *Laws of 1860*, ch. 360, p. 607.) Under the last of these acts, if he had left a wife, child or parent, the bequest would have been valid to the extent of one half of the testator's estate; and it is implied that if he left no wife, child or parent, it would be valid altogether. Again, if the proviso be not merely directory, and if the effect of it be not obviated by the law of 1848 or 1860, still the bequest is not void. The general synod, by its very incorporation, became *ipso facto* capable of taking, as has been shown. (a.) The proviso does not prohibit the general synod from taking the property in such a case; but from thus taking and holding. The distinction between a capacity to *take*, and one to take *and hold*, is well established in law. In the case of mortmain, in England, the property will pass to the corporation, but it cannot hold it. It enures to the benefit of the lord or the crown. (2 *Kent's Com.* 282, n. *Wilmot's Opinions*, 9. *Matter of Leefe*, 4 *Edw. Ch.* 395.) So in the case of an alien; a conveyance to him is not void; he has capacity to take, but he cannot hold as against the people. (*The People v. Conklin*, 2 *Hill*, 67. *Wadsworth v. Murray*, 16 *Barb.* 601. *S. C.*, 2 *Kern.* 376.) (b.) And it is settled by express adjudication, that this dis-

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inction applies in this precise case. (*Leazure v. Hillegas*, 7 S. & R. 313, 320. *Baird v. Bank of Washington*, 11 id. 411, 418. *Runyan v. Lessee of Astor*, 14 Pet. 131.) 5. But if the law be imperative, and the general synod be incapable of holding the property, it does not belong to the next of kin. (a.) The people alone can take advantage of the incapacity of the general synod to hold it; and can do so only by regular proceedings, instituted for this very purpose. The question cannot be raised in any collateral proceedings. The proviso was intended, not for the benefit of the next of kin, but merely as a matter of public policy. The people may overlook and tolerate a non-compliance with it. The power to enforce it by any private citizen at his pleasure, has been wisely and justly withheld. This is the prerogative of the State. If the people by their constituted agents, do not see fit to enforce this provision of the law, no one else has a right to usurp this prerogative. (2 *Kent's Com.* 282, d. *Humbert v. Trinity Church*, 24 *Wend.* 630. *Bogardus v. Trinity Church*, 4 *Sandf. Ch.* 758, 759. *The Banks v. Poiteaux*, 3 *Rand.* 136, 146. *Irvine v. Lumberman's Bank*, 2 *W. & S.* 190, 205. *Baird v. The Bank of Washington*, 11 *S. & R.* 411, 418. *State of Indiana v. Woram*, 6 *Hill*, 33. *Trustees of Vernon v. Hills*, 6 *Cowen*, 23. *Canal Company v. R. R. Co.*, 4 *Gill & J.* 122. *Hamilton v. Annapolis, &c.*, 1 *Md. Ch. Decis.* 107. *Comm. v. Union Ins. Co.*, 5 *Mass.* 230.) (b.) The right of the people alone, in such a case, to take the property, accords with, and seems necessarily to result from the common law rule, that on a dissolution of a corporation, the chattels belong to the people. (2 *Kent's Com.* 307. *Fox v. Horah*, 1 *Iredell's Eq.* 358, 361. *Ang. & Ames on Corp.* 667, 2d ed.)

VI. The various exceptions of the general synod to the rulings and decision of the judge at special term, were well taken; and the judgment should be reversed.

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Tobey & Silvester, for the respondents Wm. L. Laing and Catharine E. Heermance.

I. The general synod, at the time of the execution of the will of James B. Laing, and at the time of his death, held property the income or yearly value of which exceeded \$10,000, the amount to which it is limited by the act of its incorporation, and was incapable of taking any additional property. It had exhausted its legal capacity to take or acquire title to property in any form or for any purpose, and consequently cannot take the property bequeathed to it by the testator. 1. There can be no question that the yearly value of the property which it then held exceeded \$10,000; at the lowest estimate, it was \$14,229. The distinction attempted to be established between the various funds held by the synod, by the witness Peter R. Warner, cannot affect the question. The legislature has recognized no such distinction between funds that the synod might claim to hold as trustee or otherwise, and the court can create no such distinction. It has declared that the yearly value of all its property, however held, shall not exceed \$10,000. Even this witness testified that "the principal is all held by the synod," and that is sufficient to exclude it from taking additional property. The act limits its taking and holding real and personal estate, by the proviso above mentioned, in any capacity or function, or for any purpose or object. It is sufficient that it holds the property, to make the proviso applicable. 2d. The synod cannot therefore take this bequest. Its relation to it is the same as if the synod had never been empowered to acquire, take or hold any property whatever—as if there were no such body in existence, and therefore no legatee. It has no authority to take, except what the statute confers, and that has been already exhausted. This is a question entirely different from that presented where a corporation restricted as to amount or value in the acquisition or holding of property has possessions

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which have increased in value beyond the prescribed limits, or when without opposition it has received property while laboring under the disability, and the heirs or next of kin seek its recovery. Here the corporation has never had the property in possession, and its right to take or hold is contested at the outset, and the objection is fatal. Any other rule would enable this organization to take and hold property to any extent, and render nugatory the legislative restriction. (*White v. Howard*, 52 Barb. 294, 311, 314.)

II. No competent trustee is named in the will or appointed by the testator, in whom the legal estate in the trust fund designated by him as the Laing fund can vest, and the bequest is therefore void. 1. The trustee named is the general synod of the Reformed Protestant Dutch Church. Its powers are conferred and must be measured by the act of its incorporation. It can exercise no others. It is an artificial body deriving its legal existence from the statute. It is entirely a creation of the statute, and can only take such property as it is expressly authorized by the statute to take. A corporation created by the legislature has no powers other than those expressly granted it, and such as are necessary to carry into effect those that are expressly granted. (*The People v. Utica Ins. Co.*, 15 John. 358, 383. *N. Y. Firemen's Ins. Co. v. Ely*, 2 Cowen, 678, 709. *Same v. Sturges*, Id. 664, 675. *Boyce v. City of St. Louis*, 29 Barb. 650, 656. *Halstead v. Mayor of N. Y.*, 3 Comst. 430, 433. *R. S. § 3, tit. 3, part 1, art. 3, ch. 18.*) 2. This incompetency is not removed, or in any manner affected, by the provisions of the Revised Statutes, with respect to corporations. Section 1, subdivision 4 of title 3, part 1, article 3, chapter 18, of the Revised Statutes declares that, "Every corporation, as such, has power to hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter." It is not

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necessary for the purposes of the general synod, that it shall receive the property bequeathed to it, in the will under consideration, as a trustee. Those purposes do not require that pious, indigent young men preparing for the gospel ministry in the Dutch church, shall be educated at Rutgers College, from the income of the fund which is attempted to be created by the will. What is the general synod? Simply an ecclesiastical body, or, more properly, assembly. Not a scientific, literary, benevolent, charitable, or missionary society. It is not even an organization, in the general acceptance of the term. Its functions, duties, powers and purposes are defined and specified by the constitution of the church. By that constitution the ecclesiastical assemblies of the church are divided into three, consistorial, classical and synodical, and the synodical are divided into two, the particular and general synods. The general synod is a delegated body composed of three ministers and three elders from every classis. It is the final court of appeal in judicial cases, has the control of the theological seminary, and appoints the theological professors, is the channel of correspondence with other churches and exercises a general superintendence over the spiritual interests and concerns of the whole church. For none of these purposes is this fund, and the disposition of it in the manner directed by the will, necessary. The persons for whose benefit the fund is to be dispensed are not those who have entered upon the regular theological course in the seminary, but those who have entered upon the regular course of studies in Rutgers College, a general literary institution, who may leave the college after they have completed that course or may fail to pass the examination necessary, to enable them to be received as students in the seminary, and thus the ministry of the church not receive any accession to its numbers by reason of this fund. 3. The courts, in deciding when bequests and devises to corporations have been for their purposes, have given a construction to

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the statute; and that construction shows that this bequest is not within the purposes of the general synod. (*Theological Seminary of Auburn v. Cole*, 18 Barb. 378, 385. *The Same v. Kellogg*, 16 N. Y. 89. *Wilson v. Lynt*, 30 Barb. 132. *King v. Rundle*, 15 id. 146. *Levy v. Levy*, 33 N. Y. 123, 124.) 4. In the acts which have been passed for the incorporation of charitable and other societies the legislature has exhibited an intention to confine every corporation within strict limits; and it is proper to consider those acts in connection with the charter of the synod, as throwing light upon the construction proper to give to it, and as indicating that a strict construction is to be applied to the word "purposes." (*Laws of 1840, ch. 318. Laws of 1848, ch. 319.*) 5. The article of the Revised Statutes with respect to corporations, not only declares that every corporation has certain powers, but in the third section expressly provides that in addition to the powers enumerated in the first section, and to those expressly given in its charter, or in the act under which it is or shall be incorporated, no corporation shall possess or exercise any corporate powers except such as shall be necessary to the exercise of the powers so enumerated and given. To take this bequest and dispose of it according to the provisions of the will, requires the exercise of a corporate power, viz., that the property shall be held in perpetuity by the synod; and the third section, above referred to, expressly prohibits this, as it is not within the power conferred by the first section, and is not given by the act of incorporation. It is not authorized by the statute to hold property for the benefit of others. The legislature has incorporated it; but it possesses the privileges of a corporation only while it acts within its corporate powers; when it exceeds them it loses any privilege and prerogatives that it may have as a corporation, and is invested with no greater rights than any natural person. 6. The general synod is not competent, therefore, to take this bequest, either under

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its charter or the provisions of the Revised Statutes. Consequently no competent trustee has been appointed, and this is fatal to the validity of the bequest. (*Wilson v. Lynt*, 30 Barb. 132. *Voorhees v. Presbyterian Church*, 17 id. 106. *Owens v. Missionary Society of M. E. Church*, 14 N. Y. 406. *Beekman v. Bonsor*, 23 id. 306, 310. *Phelp's Executor v. Pond*, Id. 77. *Sherwood v. American Bible Society*, 1 Keyes, 561. *Downing v. Marshall*, 23 N. Y. 382.) 7. The rule that equity will not let a trust fail for want of a trustee, is not applicable to this case. (a.) It applies to cases of vacancy occurring, not to an original deficiency. (*Owens v. Missionary Society*, 14 N. Y. 381. *Phelps v. Pond*, 23 id. 77. *Beekman v. Bonsor*, Id. 298.) (b.) It applies only to trusts in all other respects valid, and cannot be applied to cure an original defect. It does not apply when there is both a failure to appoint any trustee or to appoint a competent trustee, and when the beneficiaries are indefinite. (1 *Jarman on Wills*, 218. *Hill on Trustees*, 176, 190. *Boyle on Charities*, 237. *Ayres v. M. E. Church*, 3 Sandf. 366. *Sherwood v. American Bible Society*, 1 Keyes, 561. *Story's Equity Jur.* § 1146.)

III. The act of incorporation, or the Revised Statutes, conferring no power upon the synod to take and hold the fund attempted to be created in the will, an authority to do so cannot be established by proof that previous to its incorporation it held certain funds and used the income for certain purposes; even if among those purposes was the education of young men for the ministry. The powers given by the charter and the Revised Statutes cannot be thus enlarged. The fact that as individuals the members of the general synod, or the general synod which was then purely a voluntary association, may have done certain acts, clearly cannot confer the right to do the same acts as a corporation, after they have become incorporated, when their charter does not specify the doing of those acts as among the powers granted. They become

by their incorporation a different organization, as different as two distinct persons; their identity is changed. Their existence is only such an existence as their charter gives, and independently of the purposes for which that charter creates them they have no legal life, and of course, if not in existence, can exercise no power whatever.

IV. As a matter of fact, there is no evidence in the case that any of the funds held by the synod previous to its incorporation partook in any degree of the character of the fund attempted to be created in the will under consideration, or had any of its distinctive features.

V. The beneficiaries named in the will are uncertain, unascertainable and undefined; and the bequest is therefore void. 1st. The word *pious* is a very indefinite term. The Romanist, the Baptist, the Moravian, the Lutheran, the Unitarian, the Universalist, the Dutch Reformed, the Methodist, the Episcopalian, and the Congregationalist, all hold to certain articles of religious belief different and in some instances hostile to those entertained by the other, which they consider essential, and the reception of which by an individual would be a condition precedent to his being competent to receive from either of them the designation of pious. And so if the outward walk and conduct of an individual are to be the criterion, there will be the same diversity of opinion and judgment. The difficulty will not be obviated by declaring that the belief of those doctrines usually denominated orthodox is requisite to comply with this description; for persons whose views were directly opposite to those termed orthodox, have frequently led the most beautiful outward lives, and in their daily conduct and intercourse with their fellow men, constantly exhibited a spirit of devotion towards God and of charity towards mankind. Who is to say how the standard will vary, or that it will not vary in the future? Is the question of piety to be determined for all time to come, as far as this fund is concerned, by the standard of the

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present, and are all who do not correspond with that standard to be forever excluded from its benefit; or is it to be a fluctuating standard, changing with the changing generations and adapting itself to the views of each succeeding age? The will is entirely silent upon all these points. The only light which it throws upon the subject is that the recipients of the charity must be *pious*. If the synod is to decide the point, how is it to decide the question? Is the body to be convened to pass its judgment upon each separate case as it arises, or is it to frame some arbitrary, unbending rule, and require an exact correspondence with that rule in every particular, from each individual; or is it to repose that confidence in its officers, and authorize them exercise a delegated discretion of the discretion delegated to the synod? The synod itself is a body annually changing, and its opinions with respect to the term *pious*, may vary with its change of members, and thus the question would be still left in the same doubt and uncertainty. Are the courts to decide who is pious? The same uncertainty still attaches to the bequest. The theological views of the members of the court rendering the decision must necessarily be the basis of that decision. Each judge would be controlled by his own understanding of the term, and his own interpretation of the holy scriptures. The law has fixed no definition of the term *pious*, and there is with us no State religion. 2d. Equally vague and indefinite is the word "indigent." Indigence, to a great extent, depends upon the habits, position, occupation and location of the person. The constitutions of different men vary, and their absolute necessities must be unavoidably regulated by their physical constitutions. And thus indigence becomes, to a certain extent, a question of the physical constitution of the individual, and renders a knowledge of that constitution and condition necessary, before a correct decision can be made. 3d. This indefiniteness is increased by the fact that the testator has not

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restricted his bounty to persons residing in any particular locality, or preparing for the ministry at any particular institution. 4th. Not only are the beneficiaries uncertain, but the purpose of the trust is too indefinite and undefined to be capable of judicial execution. What is the main purpose of the bequest? To assist in sustaining the Dutch church, to aid Rutgers College, to support the indigent young men, or to create a fund which shall perpetuate the name of the testator and redound to the glory of his memory? The will prescribes that the testator's name shall be given to the fund, and that it shall be preserved intact, and if possible augmented, thus furnishing an argument for the position that the testator's object was to erect a monument for himself. It provides that no part of the income shall be paid to any recipient till he shall have entered upon the regular course of studies at Rutgers College, thus giving some ground for the opinion that his intention was to supply students and funds for a favorite institution for all time, especially as nothing beyond a certain sum named in the will is to be applied to any one individual, and the advancement of any sum whatever to any person, is dependent upon his being a student at that institution. It limits the appropriation to those who are preparing for the gospel ministry in the Dutch church, thus furnishing countenance for the opinion that the object of the testator was the benefit of the church. It directs the income of the fund to be distributed among certain persons, thus affording a basis for the conclusion that the design of the testator was to supply the means for their support and assistance. But who is to say which was *the purpose* of the will, and of the testator, and which is to be executed, regardless of the others; which is, in any event, to take precedence, and which to yield? How is the court to decide what are proper expenditures in connection with the trust, and what are improper; whether the trustee is administering it in such a manner as the

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testator intended; whether the main purpose of the testator is being carried out, or is being made subservient to some other, which was not the main purpose; whether this or that act of the trustee is effectuating the real intent of the testator, or is rendering that merely secondary? 5th. This indefiniteness is fatal to the validity of the bequest. It cannot be carried into execution. As a matter of fact it would be impossible to do so; and as a matter of law the courts have decided that indefiniteness vitiates a trust. (*Story's Eq. Juris.* § 179, a. 1 *Jarman on Wills*, par. 323. *Owens v. Miss. So. M. E. Church*, 14 N. Y. 380. *Bascom v. Albertson*, 34 id. 584, 592. *Phelps v. Pond*, 23 id. 77. *Levy v. Levy*, 33 id. 101. *Trustees of Bapt. Association v. Hart*, 4 *Wheat.* 1. *Goddard v. Pomeroy*, 36 *Barb.* 546, 554.)

VI. This bequest cannot be upheld by invoking the aid of the law of "charitable uses." That system of jurisprudence has no existence in this State. The indefiniteness of the beneficiaries cannot be made certain by employing that method to ascertain or select them. Neither can the want of a competent trustee be thus obviated. "Charitable trusts," like all others, must stand or fall by their compliance with the rules of the common law. This question is now settled beyond controversy. (*Bascom v. Albertson*, 34 N. Y. 584. *Levy v. Levy*, 33 id. 97. *Owens v. Miss. So. M. E. Church*, 14 id. 398, 399, 403. *Phelps v. Pond*, 23 id. 69. *Sherwood v. Am. Bible Society*, 1 *Keyes*, 561. *Yates v. Yates*, 9 *Barb.* 346.)

VII. The legislature having repealed the statutes of Elizabeth, and the Court of Appeals having decided that the law of charitable uses is not in force in this State, the bequest to the synod is void for the want of a *cestui que trust* in whom the equitable title can vest. It is a principle too elementary to require the citation of authorities, that it is necessary to the validity of a trust, that there should be designated, or in existence, some determinate

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body or person that can come into court to claim the execution of the trust. This is admitted, even in the Williams case. Judge Denio expressly conceded, in his opinion, that the second trust created in that will must fail for this very reason, unless it could be upheld by virtue of the application of the doctrine of charitable uses. There are here no persons who can claim the execution of the trust. (See point V.)

VIII. The bequest is void because the absolute ownership of the fund is illegally suspended. 1. The Revised Statutes prescribe that the absolute ownership of personal estate shall not be suspended beyond two lives in being at the death of the testator. In the present case it is suspended forever. The trustee cannot dispose of the property, because it holds it in trust, and not absolutely, and for a class of persons, some of whom are not yet in existence; there is no *cestui que trust* who can unite with the trustee and thus dispose of the estate, because the *cestuis que trust* are not definitely pointed out, and there never can be, by any possibility, *cestuis que trust* in existence who, in conjunction with the trustee, can alienate the property and confer a perfect title. The absolute ownership of property is suspended, when a perfect alienation cannot be made. And in this case there never can be any alienation of the property. The directions of the testator are explicit, that "only the income arising from the fund, is to be applied to the purpose mentioned" in his will, and that the fund shall be kept invested; thus expressly, and in terms, providing that the property itself shall never be disposed of, but shall be kept intact and remain forever inalienable. The trustee is directed how to use the income, but the direction for the use of the property extends only to the income; the principal is to remain untouched; there is no possible contingency under which the trustee can exercise any control over the principal,

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other than to invest and keep it invested. The quality of life does not enter into the limitation in any manner. The testator has fixed his own period (regardless of the statute) during which the absolute ownership is to be suspended, and that period is for all time to come. This is in direct violation of the statute. 2. Gifts to charity, and charitable uses, are within the scope and meaning as well as the terms of the Revised Statutes. The language is general and comprehensive, and embraces any and every limitation which suspends the absolute ownership and power of alienation beyond the allowed period. (2 R. S. § 1, title "*of accumulations of personal property.*" *Levy v. Levy*, 33 N. Y. 124-134. *Bascom v. Albertson*, 34 *id.* 621. *Rose Will Case*, in *Court of Appeals*, September, 1864. *King v. Rundle*, 15 Barb. 139, 145-148. *Yates v. Yates*, 9 *id.* 324, 344, 347.) 3. The fact that the general synod is a corporation, cannot relieve the bequest in this instance from the operation of the statute. A corporation is authorized to hold property in perpetuity only when the property is held for the purposes of its incorporation. Here the real beneficiary is not the corporation, nor any of the purposes of the corporation, but persons unknown and not a corporate body of any kind. The corporation is merely the agent of the testator to distribute his bounty to individuals, and is to derive no benefit from the fund. The general act providing for the incorporation of benevolent societies and enabling them to hold in perpetuity, limits that holding to the purposes of their incorporation, and prohibits them from holding for any other, thus clearly showing that it was the intention of the legislature to exclude corporations from holding in perpetuity, except to carry out the very object for which the legislature incorporated them, and that they are not endowed with the prerogative of taking and holding property in perpetuity, to be dispensed for purposes foreign to their existence. The bequest in this case is in every respect distinct

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from that of one to a scientific or literary institution. There, if the bequest is simply to the institution, without any direction as to the disposition to be made of the gift, there can be no question that it is for the purposes of the corporation; if the bequest is accompanied with directions as to the manner of its application, to found a scholarship, to support a corps of teachers, to erect an edifice, or to supply medical and surgical aid, each of these would be within the respective purposes of the different institutions, necessary for their existence; and there could be no question that the statute would not apply. In each instance the bequest would be brought within the act of incorporation furnishing an express legislative exception to the statute. It would be to carry out the purposes of the institution, to assist in performing acts without which it could not exist, and not merely to make use of it as a convenient distributing center for supplying the necessities of those whom the testator is desirous of relieving. The immunity which a corporation enjoys from the application of the statute prohibiting perpetuities is confined to those cases in which it holds not only the legal but the equitable title, where it has not only the legal but the beneficial interest. Here the corporation takes no equitable interest in the property, is to receive, manage and invest the principal and dispense the revenue to persons who are not members of the corporation, not connected with it, and who are selected as the beneficiaries, not by the corporation, not because it was incorporated for furnishing assistance to such persons, not because they were in existence when it was incorporated and it was desired to extend aid to them, not because it is necessary for the purposes of the corporation that they should be assisted, but simply because a testator has desired thus to dispose of his property, and has chosen to make the corporation the agent to carry out his wishes. The most elastic tension of the privileges conferred upon corpora-

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tions with respect to holding in perpetuity, cannot extend those privileges to the present case. The decisions of the courts show plainly that it is excluded. (*Williams v. Williams*, 4 Seld. 525. *Levy v. Levy*, 33 N. Y. 116, 123. *Bascom v. Albertson*, 34 id. 584. *Yates v. Yates*, 9 Barb. 324, 342, 343. *King v. Rundie*, 15 id. 139, &c.)

IX. This bequest is to the general synod simply in the character of a trustee; it has no beneficial interest in the bequest; it cannot therefore take or hold the property bequeathed to it by the testator. It is a well settled principle of law that corporations cannot act as trustees in relation to any matters in which they have no interest. (*Matter of Howe*, 1 Paige, 214. *Levy v. Levy*, 33 N. Y. 97. *King v. Rundie*, 15 Barb. 139, 146-149. See also authorities cited under point 2.) So strictly has this doctrine, that corporations cannot exceed their powers, been enforced, that it has been held that a corporation cannot be seised of land for purposes foreign to its institution, and that it must exercise a power in the very manner in which it is directed to do so, or the act is void. (*Jackson v. Hartwell*, 8 John. 422. *Farmers' Loan and Trust Co. v. Carroll*, 5 Barb. 613, 649. *McSpedon v. Mayor of N. Y.*, 7 Bosw. 601.)

From this there results the following conclusions, each of which is fatal to this bequest: 1st. The bequest violates the statute which prohibits the suspension of the absolute ownership of personal property for more than two lives, as it is not such a bequest as the corporation is authorized to take and hold in perpetuity. 2d. The synod not having the power to take and hold this property as a trustee, there is no person in whom the bequest can vest at the time of the death of the testator. The beneficiaries are unknown and unascertained at the time of his death. It is uncertain whether there were then any such in existence, and the vesting of the interest in the beneficiaries would therefore be contingent. In the language of Judge Porter,

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in *Bascom v. Albertson*, "the ownership of the fund is left swinging in abeyance." The bequest is therefore invalid as contravening the law against perpetuities, even if that law be considered to extend no further in respect to gifts to charities, than to cases where the bequest is contingent. (*Phelps v. Pond*, 23 N. Y. 77. *Rose v. Rose*, in *Court of Appeals*, 1864.) 3d. If the decisions of the Court of Appeals in *Phelps v. Pond*, *Beekman v. Bonsor*, *Owens v. Missionary Society of M. E. Church*, and *Sherwood v. The American Bible Society* be correct, that a competent trustee must be appointed to receive the title and execute the trust, the bequest in this case cannot be sustained.

X. The testator not having appointed a trustee competent to take the fund and execute the trust, the bequest is as illegal and invalid as if it had been made directly to the unascertained and unascertainable persons whom it was his design to benefit, or to an unincorporated society or association. In either case it would be void, and the property would go to the next of kin. Where there is no trustee competent to take at the creation of the trust, the court of chancery has no jurisdiction to uphold a bequest even for charitable or religious purposes. (*Owens v. Miss. Society of M. E. Church*, 14 N. Y. 380. *Beekman v. Bonsor*, 23 *id.* 298.)

XI. There is here a virtual direction for an illegal accumulation of the interest and income of personal property. The testator has specified that "any sum not exceeding \$500 may be applied annually, from said income, to or towards the support and education of each one of such young men to whose support and education any part of said income may be applied." He has thus fixed a limit beyond which the trustee cannot go; but he has not directed that the whole income shall be expended in each year; neither has he fixed any amount below which the trustee shall not reduce the appropriation to each person. There may be no indigent pious young men studying for

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the ministry in the Dutch church at Rutgers College in some particular year, or there may not be a sufficient number to absorb the whole income, under the scale indicated by the testator; or there may be no persons, for some time to come, who will correspond to all the requirements of the synod as to piety. There are thus here three probable contingencies in which the income must accumulate, and there is no direction to the trustees to expend the whole income every year. In addition, the testator provides for a further accumulation and addition to the fund, by requesting that any person who shall have received any thing from the fund, and shall thereafter be able to refund the moneys which he has received, or any part thereof, will pay the same to the synod, and directing the sum so paid to be added to the principal. By these different means the principal in time might be increased to a great extent; and it is evident that the testator had in view the increase and accumulation of the Laing fund, if possible. This direction for an accumulation, and the implied direction for an accumulation in the different cases mentioned heretofore under this head, are void, as being in contravention of the statutes of this State in respect to accumulations. No accumulations are valid except in behalf of minors. The accumulations which have been enumerated as probable, and almost certain to occur from the income of the fund, irrespective of any money that may be repaid by those who have received aid therefrom, are a part of the trust, cannot be separated from it without changing the whole character of the trust, and framing a new will for the testator, and they necessarily vitiate the whole trust. The testator's idea was to create a fund that should be perpetually growing, and should be a monument of his munificence, continually increasing in amount; and this is not permitted by the law of this State.

XII. The direction in the third clause of the will, to pay the residue of the income of \$20,000 to the general

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synod of the Reformed Protestant Dutch Church, and after the death of Catherine E. Heermance and William L. Laing, to pay the principal sum of said \$20,000 to said synod, is illegal and void, for the reasons already stated in the previous points. It is liable to all the objections contained in those points with respect to the direct bequest to the synod.

XIII. The decision of the court below in admitting the testimony as to the amount of the property held by the general synod, and in overruling the various objections to the introduction of the same by the counsel for the synod, was correct. The evidence was pertinent, material to the case and decisive of the issue, (see point I;) and it would have been a manifest error to have excluded it.

XIV. The decision of the court below, excluding the evidence offered by the counsel for the synod, to prove that at all times there were more applicants for the use of the funds in the hands of the synod than there is money to maintain them; or, in other words, that the income of the fund for the study of the ministry is not sufficient to support the applicants who desire to enter upon their studies, was correct. The testimony was entirely foreign to the issue. It could throw no light upon the legality of the bequest; that is a question of law, not of fact. Whether the applicants for the use of funds now held by the synod or any other body, or person, have been many or few, cannot aid the court in determining whether the provisions of the will of James B. Laing are legal or illegal; whether the synod is authorized to act in the naked capacity of a trustee where it has no beneficiary interest; whether any definite *cestui que trust* has been named by the testator, or whether the execution of the trust would involve the violation of any statute of the State.

XV. Each and all of the exceptions filed by the general synod to the findings of the court below, are untenable.

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XVI. The refusal of the court below to find the requests of the counsel for the general synod was correct.

XVII. If the court below has omitted to find any question of fact involved, the remedy is not an exception, but a motion to have the finding corrected; the omission (even if there be one) cannot be considered on an appeal from the judgment. (*Sharp v. Wright*, 35 Barb. 236. *Niles v. Price*, 23 How. Pr. 473. *Manley v. Ins. Co. of North America*, 1 Lansing, 20.)

XVIII. The testator has endeavored to divert his property from its natural channel, has placed those joined to him by the ties of relationship upon the same level, in the amount bestowed upon them, with the nameless indigent young men referred to in his will. The court should not permit this purpose to be accomplished, and this property to pass into the hands and under the control of an overgrown corporation, unless some imperative rule of law so requires. There is no such rule, and the judgment of the court below, declaring the controverted provisions of the will invalid, and directing the property to be distributed among the next of kin of the deceased, should be affirmed, with costs of the appeal to be paid by the appellant.

By the Court, CARDOZO, J. It is a mistake to suppose that the law of trusts has any application to this case. There is but one trust created by the will, viz., the one mentioned in the third clause, and upon that no question arises here, and its only relevancy is so far as it tends to confirm the view that the fifth clause does not and was not intended to create any trust.

The third clause shows that the testator was well advised as to the proper language to be employed when the bequest was to be held in trust; and that he did not use similar phraseology in the fifth clause, goes only to show that the devise therein mentioned was not intended by him to be construed otherwise than by its terms he has

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expressed it. By that clause (5th) the testator gave the property to the general synod of the Reformed Dutch Church, "to be applied to the support and education of pious and indigent young men preparing for the gospel ministry in that church;" a purpose which was, in the highest and holiest sense, both "religious and charitable." The devise is absolute in its terms; no condition whatever is imposed. That the testator declares that he gives the property to the synod for one of the only purposes to which by law it could appropriate its property, certainly should not defeat his pious and charitable design. The statute incorporating the synod expressly provides that its property shall not be appropriated to any other than religious and charitable purposes; and all that the testator has done is to say the same thing. As the fee vests absolutely in the synod, there can be no doubt of the validity of this provision of the will.

The question whether the property, with that which the synod now holds, would exceed in amount the sum to which its charter restricts it, cannot be tried in this action. That question is not to be determined collaterally, but only in a direct proceeding by the State. The condition imposed in the act of incorporation is not against *taking*, but against taking *and* holding. (*See Runyan v. Coster*, 14 *Peters*, 128, and cases there reviewed.) The corporation, therefore, can take. Whether it can hold, is another question, not necessary nor proper in this collateral way to be considered; which is purely one of public policy, with which individuals have no concern, but in which the State, as the sovereign, is alone interested, and which it may either raise or waive, according to its pleasure. (*Humbert v. Trinity Church*, 24 *Wend.* 630. *Bogardus v. Trinity Church*, 4 *Sandf. Ch.* 758. *In re Ref. Pres. Church*, 7 *How. Pr.* 476. *Trustees of Vernon v. Hills*, 6 *Cowen*, 23. *All Saints Church v. Lovett*, 1 *Hall*, 191. *Angell & Ames on Corp.* 746, 747, and cases there cited.)

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The judgment of the special term should be reversed, and judgment ordered in accordance with this opinion. (*Edmonston v. McLoud, &c.*, 16 N. Y. 543.)

Judgment reversed.

[FIRST DEPARTMENT, GENERAL TERM, at New York, February 7, 1871.
Ingraham, P. J., and Cardozo, Justice.]

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HANCOCK vs. GOMEZ and others.

An agent, having received money for the use of his principal, is bound to pay it over to him, and has no right to return it to the person from whom he received it.

He cannot dispute the title of his principal, by setting up an adverse title in a stranger.

ON July 26, 1862, at Malaga, Spain, the plaintiff obtained from James H. Hewitt, master of the bark *Reindeer*, belonging to W. A. Sale & Co. of New York, an order on said Sale & Co. for the payment to the plaintiff of \$176.33½, balance of wages due one John H. Hanson, as mate of said bark, which order the plaintiff subsequently sent to the defendants, with a direction to Sale & Co. to pay said amount to the defendants, written thereon and signed by the plaintiff, and which the defendants received, and collected of Sale & Co. the amount of money therein mentioned, and gave a receipt therefor, and placed it to the plaintiff's credit, and acknowledged to the plaintiff that they had received it. Some two or three months after said payment to the defendants, a woman calling herself Mrs. John H. Hanson, and claiming to be the widow of said Hanson, came to Sale & Co. and claimed that she was entitled to said money; whereupon William A. Sale, of said firm of Sale & Co., went to the defendants, and they paid the money back to him, and he paid it to her.

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Said woman presented no letters of administration, or other evidence of her authority to collect said money, other than her own declarations, and those of a woman with her whom she called her mother. Said William A. Sale had never seen either of these women, until they came and claimed this money. There was no evidence in the case, of the death of said Hanson. Some time in April, 1863, a demand of said sum of money was made of the defendants, on behalf of the plaintiff, and payment thereof refused.

On the foregoing facts, the court directed the jury to find a verdict for the defendants, and the plaintiff appealed from the judgment entered on said verdict.

J. H. & B. F. Watson, for the appellant.

I. The defendants received the money in question as the agents of the plaintiff, and therefore had no right to set up the adverse title of a third party thereto; and their payment thereof to Sale & Co. amounted to a conversion thereof. (*Story on Agency*, § 217. *Story on Bailm.* § 110. *Holl v. Griffin*, 10 Bing. 246. *Harman v. Anderson*, 2 Camp. 243. *Stonard v. Dunkin*, *Id.* 344. *Dixon v. Hamond*, 2 B. & Ald. 310. *Gosling v. Birnie*, 7 Bing. 339. *White v. Bartlett*, 9 *id.* 378. *Roberts v. Ogilby*, 9 Price, 269. *Hardman v. Willcock*, 9 Bing. 378, n. *Kieran v. Sandars*, 6 Ad. & El. 515. *Hawes v. Watson*, 2 Barn. & Cress. 540. *Paley on Agency*, by Lloyd, 80, 81. *Id.* 53. *Smith Comp. Merc. Law*, ch. 5, p. 94, § 2, 3d ed., 1843. *Holbrook v. Wight*, 24 Wend. 169. *Ross v. Curtiss*, 31 N. Y. 606. *Murray v. Vanderbilt*, 39 Barb. 140. *Merritt v. Millard*, 10 Bosw. 309.) The only exception is when the principal has obtained the property fraudulently or tortiously from such third person, (*Hardman v. Willcock*, 9 Bing. 378, n; *Taylor v. Plumer*, 3 M. & Selw. 562;) and that is not shown, or attempted to be shown, in this case. The person by whom the money was claimed in this case, and to whom it was paid by Sale

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& Co., after they received it back from the defendants, showed no authority whatever to receive it. There is no evidence whatever that she was the widow of Hanson, and it was not even shown that Hanson was dead. Again; even assuming that she was the widow of Hanson, yet there is no evidence that she was authorized to administer on his estate. She produced no letters of administration; consequently her right could not have been superior or equal to that of the plaintiff, who was in the constructive possession. At common law, the real estate of an intestate goes to his heirs; the personal to his administrators. (*Coke 2 Inst.* 398. 1 *Bouv. Law Dic.* p. 83, *Administration*. 2 *Black. Com.* 494. 1 *Williams' Ex.* 330.) She could not have sued to recover this money. (*Dayton on Surrogates*, 251-253.)

Beebe, Deane & Donohue, for the respondents

By the Court, CARDOZO, J. The money for which this action was brought was collected by Gomez, Wallis & Co., by authority of, and as agents for, the plaintiff, and they acknowledged that they had so collected it, both by their accounts rendered, and by their letter to the plaintiff of October 7, 1862. Having so received the money, they had no right to return it to Sale & Co. They cannot dispute the title of their principal, by setting up an adverse title in a stranger. (*Murray v. Vanderbilt*, 39 *Barb.* 140. *Ross v. Curtiss*, 31 *N. Y.* 606.)

The ruling below was therefore erroneous, and the judgment should be reversed and a new trial ordered; costs to abide the event.

[FIRST DEPARTMENT, GENERAL TERM, at New York, February 7, 1871. *Ingraham*, P. J., and *Cardozo* and *Geo. G. Barnard*, Justices.]

DEVOR *vs.* BRANDT and SAMUELS.

Upon a motion to dismiss the complaint, at the trial, the grounds should be stated, so that the supposed defect may be obviated by proof, at the time. Mere delay by a creditor in entering judgment, or issuing an execution, is not sufficient to warrant any finding of collusion, so as to defeat a purchase made by the judgment creditor, at a sheriff's sale under the execution.

THIS is an action for claim and delivery of goods of the value of \$605.91. The defendant Brandt alone answered. In his answer he, first, denied each and every allegation in the complaint, and by his second answer, he alleged that the plaintiffs sold and delivered the goods and chattels in the complaint mentioned to George Samuels, the other defendant, on a credit, and that the plaintiffs herein, prior to the commencement of the present action, had instituted an action by the service of a summons and complaint against said Samuels, for the recovery of the price of said goods in that action claimed to have been sold and delivered to said Samuels, at prices agreed on, and which said goods were the identical goods claimed herein, and that issue has been joined in said action, and the same was still pending and undetermined. 3d. The defendant, for further answer and defense alleged: That a long time prior to the commencement of this action, the goods claimed herein were sold at public auction in the city of New York, as the property of said Samuels, and the defendant purchased at that sale the said goods and chattels, he having been the highest bidder for the same at said sale, and that he had since then owned the same, and until deprived thereof by the plaintiffs herein. Wherefore the defendant demanded judgment against the plaintiffs, that the complaint be dismissed, and that the said goods and chattels might be adjudged to belong to him, &c.

On the trial, no evidence was offered to support the second defense; and the only evidence to support the

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third came from the plaintiffs. The following facts appeared on the trial, which took place before Justice BARNARD and a jury. The goods in question were sold by the plaintiffs to the defendant Samuels, October 25, 1866, and delivered between that day and November 8, 1866. Nothing was said about terms of credit. On March 13, 1865, Samuels was sued in this court by the defendant Brandt, for \$3345, upon an indebtedness running back to March, 1863. This action was pending at the time of the sale and delivery of the goods in suit by the plaintiffs to Samuels, who concealed that fact from the plaintiffs. No defense was made by Samuels to that action; and on the 7th of November, 1866, more than twenty months after the service of the summons and before the delivery of the plaintiffs' goods was completed, judgment by default was entered therein for \$4078.34, and on the same day an execution on that judgment was issued to the sheriff of the city and county of New York, upon which the sheriff levied upon and sold the goods in suit, and made altogether on the execution \$2712.79, returning it *nulla bona* as to the residue, thus demonstrating Samuels' insolvency to the extent of \$1971.

The defendant's counsel moved to dismiss the complaint, which motion was denied, and he excepted. No testimony was offered by either defendant. The jury found a verdict for the plaintiffs. The defendant's counsel moved to set aside the verdict and for a new trial, on the minutes, which motion was denied, and he excepted. The defendant Brandt, before the entry of judgment, appealed from the order denying a new trial. He did not appeal from the judgment.

O. Bainbridge Smith, for the appellant.

I. The delivery of the goods by the plaintiffs to George Samuels was absolute and unconditional, and the title thereto vested in the buyer, Samuels. This fact, being

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undisputed, became a question of law, and the court erred in not dismissing the complaint, as requested, and to which refusal an exception was taken. (*Lupin v. Marie*, 6 Wend. 77. *Smith v. Lynes*, 5 N. Y. 41. *Decker v. Furniss*, 14 id. 617, 668. *Smith v. Dennie*, 6 Pick. 266.) In *Lupin v. Marie*, (*supra*,) it is held that "where goods are sold for which notes are to be given, and the property is subsequently delivered by the vendor without, at the time, requiring the notes or annexing any condition to the delivery, such delivery is a waiver of the obligation, which otherwise the vendee must have complied with before he could have demanded the goods, and the vendee becomes the absolute owner." In *Smith v. Lynes*, (5 N. Y. 41,) it is held that where goods sold to be paid for on delivery by notes, are delivered to the purchaser, without the notes being given or demanded, the presumption is, that the condition is waived, and that a complete title vests in the purchaser. In *Smith v. Dennie*, (6 Pick. 266,) cited with approval in 5 N. Y. 41, the sale was on the express condition that the vendee should give an indorsed note for the price, and the goods were delivered by the clerk of the vendor to the vendee without any express condition, and remained in the possession of the vendee for eight days, during which time no claim was made by the vendor for the notes or goods, when they were attached by a creditor of the vendee; it was held that there was a waiver of the condition, and a verdict to the contrary was set aside. 1. In the case at bar, there never was any condition as to the sale or delivery of the goods. The sale was complete and the delivery absolute; and the question is one of law. (*Smith v. Dennie*, 6 Pick. 266.) 2. Where any doubt arises, as to the intention with which the delivery is made, it is a question of fact for the jury; in such case the burden of proof rests upon the vendor. (*Smith v. Lynes*, 5 N. Y. 41.) 3. The vendors having

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failed to show that the delivery of the goods was conditional. The court erred in not dismissing the complaint.

II. The court erred in leaving to the jury the question whether the defendant Samuels, did not league with the defendant Brandt, in procuring the judgment with a design to deprive the plaintiffs of their property; as there is no testimony tending to prove any such fact if so found by the jury; and in not charging as requested, "there being no proof of any collusion, the jury are not to infer it."

1. Fraud cannot be presumed, but must be conclusively proved. The evidence, though it may be circumstantial and presumptive, must be strong and cogent, such as to satisfy a man of sound judgment of the truth of the allegation. (*Henry v. Henry*, 8 Barb. 588. *Averill v. Williams*, 1 Denio, 501.) 2. A new trial will be granted, on the ground that the judge submitted to the jury to determine upon a fact as to which there was no evidence before them. (*Harris v. Wilson*, 1 Wend. 511.) 3. Although fraud is a question of fact for a jury to determine, still it is a question of law whether the evidence tends to establish fraud or not. (*Gage v. Parker*, 25 Barb. 145. *Erwin v. Voorhees*, 26 id. 130.)

III. The defendant Brandt became lawfully possessed of the property; no demand of it was made of him, and therefore this action cannot be maintained against him, as no one can be subjected to an action in respect to personal property in his possession, where it was received by delivery to him without personal wrong on his part, until he has refused to deliver it to the true owner upon a lawful demand. (*Stevens v. Hyde*, 32 Barb. 171, 181. *Bliss v. Cottle*, Id. 322. *Howell v. Kroose*, 4 E. D. Smith, 357. *N. Y. Car Oil Co. v. Richmond*, 19 How. 505. *S. C.*, 6 Bosw. 213.)

IV. It is submitted that in no aspect of the case can the verdict rendered in this action be maintained, and a new trial must be granted. 1. The delivery of the property by the plaintiffs to the defendant Samuels was absolute and

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unconditional. 2. There was no fraud; and, 3. No demand made of Brandt, who became lawfully possessed of the property

A. R. Dyett, for the respondents.

I. The judge properly denied the motion for a dismissal of the complaint. 1. On the facts proved, especially in the absence of any explanation on the part of the defendants, there was evidence from which the jury had a right to find that Samuels was guilty of fraud in the purchase of the goods from the plaintiffs, even had they been expressly bought on credit. (*King v. Phillips*, 8 *Bosw.* 603. *Brown v. Montgomery*, 20 *N. Y.* 287. *Nichols v. Michael*, 23 *N. Y.* 264.) 2. Brandt, as a judgment creditor for a precedent debt, was not a bona fide purchaser for value, so as to get any better title than Samuels got to the goods. (*Acker v. Campbell*, 23 *Wend.* 372.) 3. But if it were necessary to prove that Brandt and Samuels colluded to subject the plaintiffs' goods to Brandt's execution, there was sufficient evidence to warrant the jury in finding that such collusion existed. 4. The motion for dismissal was general, as to both defendants, and no ground was specified.

II. No error was committed against the defendants in any part of the judge's charge. Its only fault was being too favorable to them.

By the Court, INGRAHAM, P. J. The motion for a dismissal of the complaint was denied. No grounds are stated in the case. The defendant now claims that it should have been granted, because there was no proof of demand, before action. That objection should have been stated on making the motion. It might have been obviated by proof at the time. (*Newton v. Harris*, 6 *N. Y.* 345. *Binsse v. Wood*, 37 *id.* 526.) There was not sufficient evidence of collusion between Brandt and Samuels to warrant

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submitting that question to the jury. The defendant's counsel asked the judge to charge the jury that there being no proof of collusion between these defendants, the jury could not infer such collusion in reference to the judgment offered by the plaintiff in evidence. That action was by Brandt against Samuels, for \$3345, commenced in March, 1865. Judgment was entered in November, 1866, and execution issued the same day. Mere delay in entering judgment or issuing execution can never by itself be considered sufficient evidence to charge the party as in collusion with debtors. It is not at all unusual for creditors to wait, before issuing execution, until they find their debtor in possession of property. Such delay, unaccompanied by other evidence, is not sufficient to warrant any finding of collusion, so as to defeat a purchase by the creditor at a sheriff's sale under the execution. I think the justice should have instructed the jury as requested, on this point.

Judgment reversed, and new trial ordered; costs to abide the event.

[FIRST DEPARTMENT GENERAL TERM, at New York, February 7, 1871.
Ingraham, P. J., and Cardozo, Justice.]

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JOHN E. HUBBELL vs. PAULINE VON SCHOENING and EMIL
VON SCHOENING.

It is well settled, in this State, that a court of equity will not disregard time, and decree a specific performance of a contract for the sale of real estate, at the suit of a party in default; unless he not only applies promptly, but has a reasonable excuse for not performing on the contract day.

The defendants, who had agreed to sell a lot of land to the plaintiff, were at the place agreed on, on the day appointed, for the purpose of passing the title, and waited the whole business day, ready to complete the sale, but the plaintiff was not ready, on his part, and did not appear. There was no

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pretext of any fraud or deceit having been practised upon him by the defendants, and the only excuse that he offered having been found not to be true, upon conflicting evidence; it was *held* that a judgment of dismissal, entered in an action brought by the purchaser for a specific performance, could not be disturbed.

A PPEAL by the plaintiff from a judgment entered at a special term dismissing the complaint.

The action was brought by the plaintiff to compel the specific performance by the defendants, as vendors, of a contract for the sale of lands. The action was tried at special term, before Justice INGRAHAM, who found the following facts:

1st. That on the 24th day of December, 1867, the defendants and the plaintiff made and entered into an agreement, in writing, by which the defendants agreed to sell and convey to the plaintiff certain real estate in said complaint mentioned and described, for the sum of \$1950, on the plaintiff paying to the defendants said sum, at the time and in the manner specified in said complaint, (viz., \$50 on the signing of the agreement, \$1180 on the 24th of January, 1868, and the balance by assuming the payment of a certain mortgage then on said premises.)

2d. That the place appointed for the performance of said contract was the office of Z. W. Butcher, the attorney for the defendants, on the 24th day of January, 1868.

3d. That the day before that appointed for such performance, the plaintiff applied to such attorney for an extension of the time of performance, to enable him to complete his searches against the property.

4th. That said attorney then promised the plaintiff to send him word as soon as the defendants came to his office, if they arrived the next day, so that he might see them about it.

5th. That said defendants, or one of them, were at said place from before 12 o'clock of the said day, with the deed

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of said premises, drawn, signed and acknowledged by them, until 6 o'clock of that day.

6th. That the plaintiff utterly failed to perform said contract on his part, and made no offer to perform the same on that day, though notified by the defendants that unless the contract was closed on that day, the defendants would have nothing more to do with the same.

7th. That when the plaintiff arrived at said office, Pauline Van Schoening had left the office; that her husband was there, and he then informed the plaintiff that she had gone home, and would have nothing more to do with the matter.

And the said justice found, as conclusions of law,

1. That the plaintiff was not entitled to a specific performance of said contract.

2. That the plaintiff's said complaint should be dismissed, with costs to the defendants.

The following opinion was delivered by the justice, at special term :

INGRAHAM, J. The contract for the sale of the lots for which this action is brought provided for the delivery of the deed and the payment of the money on the 24th of January, 1868, at a place named therein. On that day the vendors waited at the place designated, from half past 9 in the morning until 6 in the afternoon. They had the deed ready for delivery, according to the agreement. The plaintiff did not appear at the place until 4 p. m., when he said he was not ready, and asked an extension. This was refused, and the defendants insisted that the contract should be closed, and tendered the deed. Subsequently, the plaintiff offered to pay the money, and demanded the deed, to which the defendant replied that he would have have nothing more to do with it.

The only material question is, whether the defendants

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were bound to accept the tender on a subsequent day to that fixed in the contract.

The rule undoubtedly is, that time is not essential to the contract, unless made so by the parties. This may be done in various ways. The commoner one is by inserting in the contract a provision that it shall be void if not performed on the day designated. If neither party appears at the time and place fixed to complete the contract, or if no time or place is named, then the time is not essential, and the performance can be enforced afterwards. So, where the party gives notice of the intent to require performance on the day, and is ready, and tenders performance on his part, he cannot be compelled afterwards to perform, nor is he liable for damages for his refusal.

If the vendors, as in this case, attended to perform, waited the whole day, and finally made a tender of the deed and demanded performance, which was refused by the vendee, on the ground that he was not ready, I see no reason on which it can be held that he should be compelled afterwards to perform. It is clear that no damages can be recovered, because there has been no breach on his part, and equity should not compel a performance of a contract which the party offered to perform at the time designated.

There are undoubtedly cases of hardship, where a party has received the greater part of the purchase money, and takes advantage of the non-completion of the contract on the day designated, to forfeit the money paid. In such cases equity would relieve, by compelling either performance of the contract or refunding the money paid. But no such reason applies where the sum paid was only a nominal amount, to give validity to the contract.

In *Dominick v. Michael*, (4 Sandf. 374, 426,) it is said, "time is always material when either of the parties choose it shall be so. Each of them has a right to demand the performance of the contract upon the stipulated day, and

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if the other party is then unwilling or unable to perform, may instantly elect to rescind it. By such an election he is wholly freed from the obligations of the contract, and it therefore involves a plain contradiction to say that a court of equity can subsequently decree a specific performance. The parties themselves may revive a contract abandoned or rescinded, but no court, by its own authority, can resuscitate a contract which, by the lawful act of the parties, or one of them, had ceased to exist." In *Benedict v. Lynch*, (1 *John. Ch.* 370,) the chancellor says: "It is incumbent on a plaintiff calling for a specific performance, to show that he has used due diligence, or if not, that his negligence arose from some just cause, or has been acquiesced in; and it is not necessary for the party resisting performance to show any particular injury or inconvenience; it is sufficient if he has not acquiesced in the negligence of the plaintiff, but considered it as releasing him." In *Parkin v. Thorold*, (11 *Eng. Law & Eq.* 275,) the purchase was to be completed on a particular day. The time, by agreement, was extended to another day. The court held that a specific performance would not be decreed after the time fixed had expired. In that case it is said, "though the terms of the agreement stipulate for the completion of the contract on a given day, yet if the parties have dealt together on the footing that the contract should be construed as a contract to complete in a reasonable time, this court acts on that as the real contract to be enforced."

But this relief is given solely on the ground of such dealings of the parties. I have not been able to discover any case, in modern times, in which the court compelling performance after the appointed day, has not proceeded on this ground.

In *Seton v. Slade*, (7 *Vesey Jr.* 265,) Lord Eldon says: "There is no authority that has not some reference to the conduct of the parties." In fact the very nature of the contract is such that performance by either must be a defense

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to a claim for damages, and if so, an offer to perform is equally good. It is only where the parties, by their actions, show that they did not intend to insist on a strict compliance with those terms, that a court of equity will give relief.

In the present case the vendors were ready, and waited all day to perform, at the place appointed, and when an extension was asked for it was refused.

Under such circumstances, I think the plaintiff has no ground on which to ask now for a specific performance.

The complaint should be dismissed.

A judgment of dismissal being entered accordingly, the plaintiff appealed.

Wm. Fullerton, for the appellant.

I. Time was not of the essence of the contract in question. 1. Nothing in the contract indicates that it should be so considered. 2. The parties neither by word nor action indicated that it should be so considered, until after four o'clock of the day named for its consummation. The general term of this court, in *Williston v. Williston*, (41 Barb. 642,) states the rule of law applicable to this class of cases, clearly and precisely, as follows: "It is a familiar doctrine of the courts of equity, that time is not ordinarily of the essence of a contract in regard to real estate. It may, under certain circumstances, become so; but the general rule is, that if a party has not been guilty of gross neglect, if his delay can be reasonably explained and be consistent with good faith, and time has not been made material by the contract of the parties, a court of equity will afford relief." Again, this court, at a general term, in the case of *Gale v. Archer*, (42 Barb. 320,) says: "The stipulation—as to date of payment in such contracts—means, in truth, that the purchase shall be completed within a reasonable time, regard being had to the circumstances of the case and the nature of the title to be made." Again, the Superior Court, at general term, says: "It is true that in

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a contract for the sale of land, time is not of the essence of the contract." (*Dominick v. Michael*, 4 Sandf. 426.) Judge INGRAHAM, in his opinion in this case, says: "The rule undoubtedly is, that time is not essential to the contract, unless made so by the parties." (*Edgerton v. Peckham*, 11 Paige, 352.) Will a court of equity allow one of the parties to make time essential after the close of bank hours on the day of performance, when the contract did not make it so, and the parties have had no intermediate dealings? See also, on this general subject, *More v. Smedburgh*, (8 Paige, 600.) This case was affirmed on appeal, (26 Wend. 238,) where the chancellor states it as a rule, that unless, by the terms of the agreement, the time of making the title was an essential part of the agreement, equity will relieve a party who has not been guilty of gross negligence. Also, *Scarborough v. Arrant*, (25 Texas, 129;) *Harris v. Bennett*, (26 id. 568,) where the court says: "The fact that negligence may be imputed to a party will not deprive him of the aid of a court of equity to enforce specific performance when time is not of the essence of the contract." We submit that no case can be found in which any respectable court of equity, after having examined the question, have refused to decree specific performance in a case so strong as this.

II. The failure of the plaintiff to make tender of the money on the 24th day of January, 1868, was excusable. It was reasonably explained, and the explanation is consistent with entire good faith on his part. He applied the day before to the attorney of the parties for a few days' time to "complete his searches." This request was reasonable. The attorney "did not express any doubt that the request would be complied with; but, on the contrary, gave him to understand that there would be no difficulty, as soon as he could see the doctor." He said "that the doctor would be down to-morrow, and when he did come he would send around for me, and adjust the matter with

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him." Butcher did not keep his promise. After waiting until after four o'clock to hear from Butcher, and getting no word, the plaintiff went to his office. Neither Mr. nor Mrs. Von Schoening were there; he left the contract with Butcher for the purpose of securing Von Schoening's indorsement of an extension, thus showing his reliance on the promise of the previous day. On calling again, he saw Von Schoening, who informed him that Mrs. Von Schoening "had gone home, and would have nothing more to do with it." He naturally recalls to Butcher the promise of the day before, to which Butcher replies that he had not seen Mrs. Von Schoening or the doctor during the day. This declaration, made between four and five o'clock of a short winter day, that Mrs. Von Schoening "had gone home, and would have nothing more to do with it," was the first intimation that the plaintiff had that the defendants intended "to make time of the essence of the contract." 2. The plaintiff from this time showed great diligence in seeking the parties and making the tender, which was done the next day. He tried to find Mrs. Von Schoening that night. He went to her house at 110th street the next morning, but did not find her, and again the same evening, and waited until eleven o'clock. She did not come home, but stayed down town. The plaintiff not being able to find her, brought this action. Within a day or two the summons was served.

III. The defendants, and not the plaintiff, are to blame. The case throughout shows conclusively that the defendants were anxious to avoid their agreement, as the property had risen in value. They purposely misled, and then avoided the plaintiff. A court of equity will not aid them in their iniquity.

T. W. Wardell, for the respondents.

I. The plaintiff's first exception is to the finding of fact, "that the plaintiff utterly failed to perform said contract

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(the contract mentioned in the complaint) on his part, and made no offer to perform the same on that day, though notified by the defendants that unless the contract was closed on that day, the defendants would have nothing more to do with the same." The finding of the judge on this question of fact is conclusive, if there is any conflicting evidence, or any evidence at all to sustain the finding. (*Pearson v. Fiske*, 7 Abb. Pr. 419. *Murfey v. Brace*, 23 Barb. 561. *Roberts v. Carter*, 28 id. 462. *Gilbert v. Luce*, 11 id. 91. *Mann v. Witbeck*, 17 id. 388.) In this case there is not only evidence to sustain this finding, but the evidence on the point is conclusive and uncontradicted. The testimony of the plaintiff is, that he called on the day specified, and asked for an extension of a few days, to complete his searches; that the defendant, E. Von Schoening, replied, that his wife had been there at twelve o'clock, and, as the plaintiff was not there, had gone home, and would have nothing more to do with it; and that he made no offer or tender then, because he did not consider it necessary, and had no money with him; and this testimony is supported by Butcher and Emil Von Schoening, and is contradicted by no one.

II. The plaintiff's second exception is to the judge's conclusion of law, "that the plaintiff is not entitled to a specific performance of said contract." The contract was, that the defendants would convey the lots to the plaintiff, on being paid the purchase money at the time mentioned in the contract. And that the plaintiff was notified that unless he was ready at the time mentioned in the contract, the defendants would have nothing to do with it. That the defendants attended at the place upon the day agreed, and waited there several hours, with the deed ready for delivery. That though the plaintiff was at said agreed place at the time agreed, he made no offer to perform, but asked for an extension of time to complete the contract; which was refused. The defendants having chosen to

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make time material, and having demanded the performance of the contract upon the stipulated day, had a right to rescind the same, and the plaintiff was not entitled to a specific performance of the same. (*Dominick v. Michael*, 4 Sandf. 374. *Benedict v. Lynch*, 1 John. Ch. 370. *Chase v. Hogan*, 3 Abb. Pr., N. S., 57. *Parkin v. Thorold*, 11 Eng. Law and Eq. 275.) There were no exceptions in the case taken on the trial, and none to the judge's findings of fact, except the one mentioned above, which has been clearly shown to be untenable; and that exception failing, the plaintiff's whole case fails, as the court could not fail to decide, upon the facts as found, that the plaintiff was not entitled to a specific performance of the contract.

By the Court, CARDOZO, J. It is well settled, in this State, that a court of equity will not disregard time, and decree a specific performance of a contract for the sale of real estate at the suit of a party in default, unless he not only applies promptly, but has a reasonable excuse for not performing on the contract day. In this case the defendants were at the place agreed on, for the purpose of passing the title, and waited the whole business day, ready to complete the sale, but the plaintiff was not ready on his part. There is no pretext of any fraud or deceit having been practiced upon him by the defendants, and the only excuse that he offers, viz., that the defendants' attorney, when he applied for an extension of time to complete, told him that he thought there would be no difficulty about it, has been found not to be true, upon conflicting evidence, and we cannot disturb the judgment.

Judgment affirmed.

[FIRST DEPARTMENT, GENERAL TERM, at New York, February 7, 1871.
Cardozo and Geo. G. Barnard, Justices.]

THE ONEIDA NATIONAL BANK OF UTICA *vs.* STOKES and others.58b 508
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In March, 1870, an action having been noticed for trial by both parties, judgment by default was granted, in favor of the defendant. In April thereafter, that default was opened, upon terms which included setting the case down for trial for the fourth Monday of that month, at special term. *Held* that the terms upon which the default was opened were discretionary; and that no point could be raised, upon them, against the regularity of the trial in April, unless the cause was in such a condition, as to issue, as not to be triable.

Held, also, that, if the cause was at issue, then, whether it had been noticed or not, would be wholly unimportant if the judge saw fit to include going to trial as one of the conditions of opening the default.

Whether a cause can properly be brought to trial as against one defendant, when not at issue as to the others, where no previous order for a separate trial has been allowed by the court? *Quere.*

A party, by noticing a cause for trial, must be considered as admitting that it was at issue at that time, and is estopped, by that act, from objecting that issue was not joined.

Until issue joined, a plaintiff has no right to notice the action for trial; and after having brought the defendants to court upon his (the plaintiff's) notice, the latter cannot be heard to say that they had been improperly brought there, if the defendants do not see fit to make the objection.

Although an appeal lies from an order for an allowance, yet when the allowance is granted at the trial, by the judge then presiding, who has seen and can best appreciate whether it is a difficult and extraordinary action, it must be a very glaring case of an excessive allowance which can justify interference with his discretion by an appellate tribunal.

APPEAL by the plaintiff from a judgment dismissing the complaint, entered on a trial by the court without a jury.

The plaintiff obtained a judgment against the defendant Edward H. Stokes, and an execution on it was returned unsatisfied. The plaintiff then commenced this suit, alleging that certain property known as the Sterling Oil Works, and the title to which stood in the name of the defendant Nancy Stokes, was really the property of her husband, Edward H. Stokes, and subject to execution against him; and also alleging that a certain mortgage given to the defendant Clark was fraudulent, or fraudulent

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as to a part thereof, and asking to have it so decreed so far as the claims of the plaintiff were affected. The Manhattan Savings Institution was also a party, but at the time of this trial had not yet answered.

The action was tried at the New York special term, in April, 1868, by a justice of this court, without a jury. At the preceding March term the case had been called and the plaintiff's default taken, and the same allowance granted on the default. The default had been opened by the court at a special term and the case ordered to be tried forthwith at the April term. The case had been noticed for the March term, but had never been noticed for the April term.

On the case being called at the April term the plaintiff objected to the trial proceeding, and moved to strike the cause from the calendar, on the ground that the cause had not been noticed for trial since the default referred to, and that the court had no power to direct a trial to take place without the regular notice of trial; and also on the further ground that the action was not at issue as to the Manhattan Savings Institution, a co-defendant, and could not be thus tried in parcels.

The court overruled the motion, and ordered the trial to proceed, and the plaintiff excepted.

On the conclusion of the plaintiff's evidence, the court dismissed the complaint, and gave an extra allowance to the defendant Nancy Stokes, and another to the defendant Clark, both for the full amount.

G. S. P. Stillman, for the appellant.

B. F. Dunning and Spring & Wetmore, for the respondents.

By the Court, CARDOZO, J. In the month of March, 1870, this cause having been noticed by the plaintiff as well as by the defendants, judgment by default was granted

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in favor of the defendants. That default was opened by Judge INGRAHAM, in April, 1870, upon terms, which included setting the case down for trial for the fourth Monday of April, at special term. The terms upon which the default was opened were discretionary, and no point can be raised under them against the regularity of the trial in April, unless, indeed, the cause was not in such condition as to issue, as to be triable. If the cause were at issue, then, whether it had been noticed or not, would be wholly unimportant, if the judge saw fit to include going to trial as one of the conditions of opening the default. I do not think it necessary to determine, on this appeal, whether the cause could properly be brought to trial as against one defendant, when not at issue as to the others, when no previous order for a separate trial had been allowed by the court, (*Code*, § 258 ;) because I think the plaintiff, by noticing the cause for trial, at the March term, must be considered as admitting that the cause was at issue, at that time, and is estopped by that act from objecting that issue was not joined. Until issue joined, the plaintiff had no right to notice the action for trial, (*Code*, § 256 ;) and after having brought the defendants to court upon his (the plaintiff's) notice, I think the latter cannot be heard to say that they had been improperly brought there, if the defendants do not see fit to make the objection.

I may add, that no possible harm or injustice could have been worked to the plaintiff, in this case, by the trial proceeding before issue was joined as to the Manhattan Savings Institution ; because the judge below has found, and we think his findings justified by the evidence, that the property sought to be reached belonged to Mrs. Stokes ; and that being so, the plaintiff could have no relief against any one.

Although an appeal lies from an order for an allowance, yet when the allowance is granted at the trial, by the judge then presiding, who has seen and can best appreciate

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whether it is a difficult and extraordinary action, it must be a very glaring case of an excessive allowance, which can justify interference with his discretion, by an appellate tribunal. That cannot be said to be the case here.

Judgment affirmed.

[FIRST DEPARTMENT, GENERAL TERM, at New York, February 7, 1871.
Ingraham, P. J. and *Cardozo*, Justice.]

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LAWRENCE vs. MAXWELL.

In an action against a broker, to recover damages for the conversion of shares of stock alleged to have been deposited with him as security against loss on purchases and sales of gold, for account of the plaintiff, the latter testified that the pledge of stock was made merely to secure a margin. The defendant swore that he required a margin of ten per cent, which he expected to receive in money, but that after the purchase of the first \$100,000, the plaintiff inquired if he could not use the stock, instead of the money, and the defendant consented to take it. *Held* that by the proposition to give the defendant the stock instead of the money, and for its use by the defendant, it was clear that the intent was that the defendant should use the stock as he might lawfully have used the money; and that for doing so, he was not liable, in an action of tort.

Held, also, that as the statements of the parties were contradictory, it came within the province of the jury to decide which was the contract between them; and the judge could not take that question from the jury.

Held, further, that an offer to show that, before this transaction, shares had been deposited with the defendant, and he had hypothecated the same, and that such use of the stock being communicated to the plaintiff he made no objection thereto, should have been admitted, as showing the construction of the contract by both parties. And that it was properly for the consideration of the jury, in determining what the terms of the contract were. *CARDOSO, J.*, dissented.

That although by the contract as stated by the defendant he had a right to use the stock in the same manner as the cash, had that been deposited, he was bound by his contract to return the stock whenever the plaintiff tendered the amount due to him, for which it had been pledged.

That upon a tender being made, it was the duty of the defendant, at once, or within a reasonable time, to restore the stock; and that having failed to do

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so, the plaintiff was entitled to recover, on the contract, its value. But that if the defendant, by the contract, had the right to use the stock, by hypothecation, there was no tort committed by the omission to restore it, and the plaintiff's remedy was on the contract, and not for the conversion.

THIS action was brought to recover damages for the conversion of four certificates of Atlantic Mail Steamship Company's stock, each for 100 shares, which the plaintiff, in his complaint, alleged had been deposited with the defendant on or about the 21st of December, 1866, as security against any loss which the defendant might sustain on purchases and sales of gold coin, to be made for account of the plaintiff. He alleged that the transactions for which the certificates had been deposited were closed, and the defendant had rendered an account showing due to him \$11,600.22; that the plaintiff had tendered this amount, and demanded the return of the said certificates, or the transfer to the plaintiff of said 400 shares of stock, or of a like number of such shares, which the defendant had failed to do.

The defendant denied that he held the same solely as security against loss on such purchases and sales of gold coin, but insisted that he held it as security against all indebtedness of the plaintiff to him, and for all moneys due or to become due to him in the course of his transactions with the plaintiff, and alleged that at the time of such tender and demand there were other transactions and accounts between the parties pending and unsettled, and that at such time there was a much larger sum than \$11,600.22 due to the defendant. The defendant also alleged that he received said securities for the purpose of enabling him to raise money thereon, and that by a well-known custom and usage he was authorized and entitled to use, hypothecate, or otherwise dispose of them, and that the plaintiff was aware and cognizant of such usage. The answer denied any wrongful or fraudulent conversion or disposition of the said securities. The action was tried at

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a circuit court, before Justice BRADY and a jury in June, 1870. The plaintiff was the only witness called to prove what took place at the time of the defendant's employment. His statement is as follows: "On December 20th, 1866, I called at the office of Mr. Maxwell, and stated that I desired to sell \$100,000 gold, and asked him if he would sell it for me, and that I would leave Atlantic Mail stock as security. He said he would. I asked him how much he wanted. He said leave him 200 shares." * * The gold was sold, and subsequently a purchase of a corresponding amount of gold to cover the sale was made. The plaintiff then says: "Two days afterwards, December 26th, I called, and asked Mr. Maxwell to sell again \$200,000 gold. The next day he reported sale. A few days afterwards, December 31st, I called and said to him that I desired to sell some more gold, and asked him whether he wanted any further security than the 200 shares of Atlantic Mail I had left him before. He said yes, he ought to have. I asked him how much. He said I had better leave him 200 more, which he knew I had. I said very well, give the order for sale and I will get the securities. I went and got the securities, brought and delivered them to him, making 400 in all."

This was all the testimony on the part of the plaintiff in regard to the original transaction.

The plaintiff further stated that all the gold which Maxwell was ordered to sell, was sold short—that the plaintiff had none of it to deliver—and that Maxwell furnished or procured the gold to make the deliveries with. It was proved that the gold transactions resulted in a loss of \$11,600.22, and that that amount was tendered, and the demand made as alleged in the complaint.

The defendant gave this account of the transaction: "I was in the Stock Exchange when the plaintiff came over to the railing and told me he wanted to have some

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transactions in gold, and he wanted to know what margin I required. I told him ten per cent. He told me to sell \$100,000 gold, which I did. He came back again, and afterwards asked me if I could use Atlantic Mail just as well; if it would suit my purpose it would be much more convenient for him. * * * He asked me what margin I wanted, and I told him ten per cent, thinking I was to get the money. I sold the gold and reported to him; he came back to me and asked me if I could use Atlantic Mail just as well as the money; if it would suit my purpose it would be very convenient to him. I took the shares. I was disappointed that I did not get the money." The defendants offered to show that to make the deliveries of gold sold short, he was, by custom and usage, compelled to borrow the gold, and to raise the money and pay for it at the time it was borrowed. He also offered to show that money paid to a broker as margin is not kept separate and distinct from other moneys, but is mixed up with his own as his business requires. Also to show a custom and usage by which a broker is authorized to hypothecate or otherwise use securities received by him as margin on transactions like those in question, and that the plaintiff had knowledge of such custom. Also to show a custom and usage by which brokers are authorized to retain all the securities in their hands at any time, as security for all moneys due them. And that in previous transactions, the securities deposited with him by the plaintiff as margin on gold and stock transactions, had been hypothecated and used by the defendant, and that the plaintiff had knowledge thereof. It was proved in this connection that when the plaintiff was informed that 200 of the shares of the stock in suit had been used by the defendant, he made no objection, and found no fault. On the question of damages, the defendant offered to show that the stock in question was a fancy stock, having no other value than was given to it by speculation, and that it fluctuated from

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fifty to seventy-five per cent in the course of five or six months. Which offer was refused.

The evidence being closed on both sides, the court decided that there was no question to go to the jury, and that on the evidence the plaintiff was entitled to a verdict, and to recover as damages the highest market value of the stock since January 26th, 1867; which was stated by the witness Lockwood to have been 121; and that the plaintiff was therefore entitled to a verdict for the sum of \$48,400, and directed the jury to find such verdict accordingly. The defendant excepted. The jury, under the direction of the court, rendered a verdict for the sum of \$48,400, (making no deduction or diminution on account of the \$11,600.22 due to the defendant.)

The court ordered the exceptions to be heard in the first instance at a general term, and that judgment be, in the meantime, suspended.

W. W. Macfarland, for the plaintiff.

I. The common law duty of a pledgee is to restore the thing pledged when the pledgor offers to redeem and perform the obligation, whatever it may be, to secure the performance of which the pledge was made. (*Edwards on Bailment*, 91, 129.)

II. A custom or usage in derogation of the common law is void. (*Firth v. Barker*, 2 John. 327. *Brown v. Jackson*, 2 Wash. C. C. 24. *U. S. v. Buchanan*, 8 How. 83, 102. *West v. Ball*, 12 Ala. 340, 347. *Dewees v. Lockhart*, 1 Texas, 535, 537. *Rapp v. Palmer*, 3 Watts, 178. *Beirne v. Dord*, 1 Seld. 102. *Sweet v. Jenkins*, 1 R. I. 147. *Singleton v. Hilliard*, 1 Strob. 203, 216. *Snowden v. Warder*, 3 Rawle, 101. *Hinton v. Docke*, 5 Hill, 437. *Strong v. Bliss*, 6 Metc. 393. *Donnell v. Columbia Ins. Co.*, 3 Sumner, 367, 377. *Coze v. Husley*, 3 Penn. 246. *Wheeler v. Newbould*, 16 N. Y. 393. *Markham v. Jaudon*, 41 id. 239.)

1. The Court of Appeals, in the recent case of *Markham*

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v. *Jaudon*, have affirmed this rule of law, and applied it to a case of much more doubtful complexion than the one at bar. In that case the property converted was purchased by the broker, in his own name, with his own money, but on account of the principal, who had deposited a margin to secure the broker against loss; the broker having sold without authority or notice, sought to defend on the ground of an existing custom to sell in like manner in such cases. This was held not to be admissible. In the case at bar the defendant had nothing to do with the acquisition of the property in question. In the execution of the commission intrusted to him he might incur a certain amount of liability equivalent to the difference in the price of gold from day to day, or that difference might be productive of a profit. But to secure the payment in money of the amount of any loss that might result on closing the transaction, the stock in question was pledged, and for no other purpose. 2. It would be sufficiently absurd to hold that the plain principles of the common law applicable to such a state of facts, might be overcome and set at naught by proof of a local usage of brokers to sell or hypothecate property so pledged, in order to raise money for the particular transaction undertaken upon the security of the pledge; but this stock was pledged to raise money generally for the defendant, as he himself says.

III. None of the defendant's objections were well taken. 1. Proof of the market value of the stock on the 2d of December, 1867, was admissible. (*Burt v. Dutcher*, 34 N. Y. 493.) 2. Proof that the stock was a "fancy stock" was not admissible, as it had no tendency to disprove its market value, or lessen the plaintiff's actual loss. 3. Proof that it was difficult to raise money on this stock, was not admissible. The plaintiff did not seek to raise money on it, and the defendant had no right to raise money on it. The fact was in nowise involved in the issue. 4. Proof that the defendant had to borrow the gold, and for that

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purpose had to furnish money, was not admissible, for it had no tendency to prove a rightful appropriation of the plaintiff's stock; and because it was immaterial what means the defendant adopted to the end of performing the duty he had undertaken, provided he did not, for that purpose, wrongfully convert the stock pledged. 5. Proof as to the use made by a broker of money paid in as a margin, was obviously immaterial and inadmissible, having no relation to the issue. 6. Proof of a local customary lien in favor of brokers upon all securities in their hands, for any moneys due, growing out of transactions in their office, was not admissible. (a.) Because there was no state of facts proved to which it could possibly apply. There was no money due the defendant, except the money tendered previous to the commencement of this action. (b.) Because the common law defines the right of lien in such cases, which cannot be changed or modified by usage in a particular locality. 7. Evidence was not admissible to prove knowledge of the plaintiff that the defendant had hypothecated other securities pledged to the defendant by the plaintiff in other transactions. (a.) Because if pledged without the plaintiff's consent, but returned to the plaintiff upon demand, at the expiration of the time limited, the plaintiff had no cause of complaint. (b.) Because if pledged with the plaintiff's permission, it affords no argument in support of the right to pledge without permission. (c.) If the plaintiff had known of and excused one conversion, a right to commit another wrong could not be predicated upon the fact. Therefore the evidence was not, and could not have been admissible. 8. A conclusive answer to the last objection, and also to the objection last considered, is that it did not tend to prove any previous agreement or subsequent assent to the hypothecation of the stock in question, and its conversion by the defendant. The defendant's pledge of this stock for any purpose was without authority, and a flagrant

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breach of his duty. If his means were so limited that he required ready money to carry on the transaction, he should have said so. But when he undertook to carry it on upon a pledge of personal property, to secure himself against loss in the end, nothing but *vis major* can excuse him from restoring it. If the plaintiff had desired to have the stock converted into money, he would have chosen his own time and method of doing so.

John E. Burrill, for the defendant.

I. The court erred in excluding the defendant's offer to show a custom and usage by which brokers are authorized to hypothecate or otherwise use securities received by them as margin on transactions, like those in question. 1. The evidence did not tend to vary or alter any contract actually made between the parties, or to overrule any rules of law prescribing its effect, but was for the purpose of ascertaining what the contract was. 2. In the cases in which evidence of custom has been excluded, the contract was definitely and precisely ascertained, and the custom sought to be introduced, tended to change its terms or alter its legal effect. 3. In most of the cases the contract between the parties or the relations existing between them were defined by a written instrument, and where such was not the case, they were definitely fixed and ascertained by other legal evidence. 4. In the present case, at the time the evidence was offered, not only was the testimony on the part of the plaintiff loose and indefinite and lacking in precision, but there was a difference between the version of the transaction given by the plaintiff and that given by the defendant. 5. The evidence was competent to cover any points which the parties in their conversation had left open, and was also competent to show that the version of the transaction given by the defendant was correct. 6. Maxwell had testified that the plaintiff asked him if he could use the Atlantic Mail

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Stock just as well as the ten per cent, or money, which had been originally spoken of * * * Maxwell had also testified that he was disappointed in not receiving the money, * * * and we offered to show that it was difficult to raise money on the stock, and hence his disappointment. In this state of the evidence, our offer to show that, by the custom and usage, we were entitled to use the stock by hypothecation or otherwise, was competent, and tended to show that the plaintiff intended that it should be, and knew that it would be so used. 7. In this connection attention is called to the allegation in the complaint, that the plaintiff when making his tender demanded a transfer of the four hundred shares, or of a like number of such shares. 8. Evidence of the custom in question was not offered to show, nor did it tend to show, that the legal ownership of the plaintiff's stock had become vested in Maxwell, or to exonerate Maxwell from his legal liability to account for the stock, but merely, while conceding the responsibility of the defendant, and his liability to account to the plaintiff for and in respect to the stock, to show that he was not guilty of a fraudulent conversion, or liable as a wrongdoer. Such evidence went to show, that although liable to account for the value of the stock in another form of action, the defendant was not liable in this. This is not in conflict with the principle laid down by the authorities so far as they have come to our knowledge. 9. If the plaintiff had consented to the use of the securities by the defendant, there was no conversion. The plaintiff is presumed to have contracted with reference to the usages of the business, and the evidence was competent to show implied assent. 10. There is nothing unreasonable in the custom and usage sought to be shown.

II. The principles decided in the following cases justify the reception of the evidence. (*Markham v. Jaudon*, 41 N. Y. 239, 252, 246. *Beardsley v. Davis*, 52 Barb. 164.

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Helme v. Ins. Co., 61 Penn. 107.) These cases show with clearness, the circumstances under which custom is admissible, and the ground on which, and when, it is admissible. (*Horton v. Morgan*, 19 N. Y. 170. S. C., 6 Duer, 61.) Evidence of a custom that brokers only, and not their customers, are known in transactions at the board, was received. In the same cases, evidence of usage among brokers to take the title to stock purchased in their own name was received to show that the broker was not guilty of conversion. *Whitehouse v. Moore*, (13 Abb. Pr. 143,) and *Peckham v. Ketchum*, (5 Bosw. 506,) lay down the same propositions. Where there is nothing in the agreement to exclude the inference, parties are presumed to contract in reference to the usage or custom, and usage is admissible to explain the intention. (*Wadsworth v. Allcott*, 6 N. Y. 64.) In *Esterly v. Cole*, (3 N. Y. 502,) evidence of a usage to charge interest on an open running account was admitted; and it was there held that where there is a general usage in any particular trade to charge or allow interest, parties having knowledge are presumed to contract with reference to it; and, if the usage does not conflict with the terms of the contract, it will be deemed to enter into and constitute a part of it. In *Hinton v. Locke*, (5 Hill, 438, 439,) in an action on a contract to pay twelve shillings per day for each man, evidence of usage was admitted to show that ten hours' labor constituted a day's work. In *Fox v. Parker*, (44 Barb. 541,) evidence of a usage in the business of selling paper was admitted, on the ground that it was proper to interpret by usage the otherwise undetermined intentions of parties, and to ascertain the nature and extent of their contracts arising, not from stipulations, but from mere implications and presumptions, and acts of a doubtful character. (See also *Smith v. Marvin*, 27 N. Y. 140; *Suydam v. Westfall*, 4 Hill, 211; *Dunham v. Pettee*, 1 Daly, 112; *Ely v. New Haven Steamboat Co.*, 53 Barb. 207; *Gibson v. Culver*, 17 Wend. 305, and authorities cited

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in 2 *Pars. on Cont.* 186-196; *Stanton v. Small*, 3 *Sandf.* 230.) In *Pollock v. Stables*, (12 *Q. B.* 765,) evidence was admitted to show the rights and obligations of brokers in respect to the purchase of stocks. 2 *Parsons on Contracts*, 535-546, contains numerous authorities in support of our proposition. *Story on Agency*, 98, 249, and 1 *Parsons on Contracts*, 54-61, lay down the rule, supported by numerous authorities, that the authority and duty of the agent are determined by reference to usage and custom.

III. Evidence of usage, to show that by the custom the broker alone was known in the transaction, and was obliged to provide the means and pay for the gold, was improperly excluded. (*Horton v. Morgan*, 19 *N. Y.* 170. *Whitehouse v. Moore*, 13 *Abb. Pr.* 143. *Peckham v. Ketchum*, 5 *Bow.* 506. *Pollock v. Stables*, 12 *Q. B.* 765.)

IV. The evidence of the usage, to show the right of the defendant to retain the stock as security for all other transactions, was improperly excluded. (*Ex parte Deeze*, 1 *Atkyns*, 228. *Ex parte Ockenden*, *Id.* 234.)

V. Irrespective of such evidence, the defendant was entitled to hold the stock as security for such transactions, and the plaintiff not having tendered to the defendant the amount of the loans made by him to the plaintiff, was not entitled to receive the stock, and the defendant was not guilty of a conversion. (1 *Pars. on Cont.* 262 and notes.)

VI. The evidence to show that in previous transactions between the plaintiff and Maxwell, of a similar nature to those in controversy, and under like circumstances, the defendant had used securities received by him from the plaintiff, and that the defendant had knowledge thereof, was erroneously excluded. It was competent to show an implied assent to the use of the securities on the present occasion, and to show that such use was not wrongful or fraudulent. Had the plaintiff consented expressly to such use, there was no conversion, and evidence of any fact

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from which such assent might be inferred or implied was competent.

VII. At all events, the evidence of such use by the defendant on previous transactions, with the knowledge of the plaintiff, in connection with the evidence that such use was in accordance with the custom, was competent to show that the disposition of these securities by the defendant was not wrongful.

VIII. The evidence did not justify the court in directing a verdict for the plaintiff, but the same should have been submitted to the jury to determine what the agreement was, and also on the question whether the plaintiff had acquiesced in the use of the stock.

IX. The court erred in respect to damages. 1. The plaintiff was not entitled to the highest market value of the stock. 2. No allowance was made to the defendant for the amount actually due him on the transaction for which he held the stock as security, viz., \$11,600.22, and interest from January 19, 1867.

INGRAHAM, P. J. Different versions of the contract are given by the plaintiff and the defendant, in their evidence on the trial. According to the plaintiff's evidence, the pledge of the stock was merely made to secure a margin, and if correct, the case would come within the rule as laid down in *Markham v. Jaudon*, (41 N. Y. 239,) and the same could not be used by the broker. According to the evidence of the defendant, he required a margin of 10 per cent. This he expected to receive in money; but after the purchase of the first \$100,000, the plaintiff applied to him and inquired if he could not use the stock, instead of the money, and the defendant consented to take it. By the proposition to give the defendant the stock instead of the money, and for its use by the defendant, I think it clear that the intent was that the defendant should use the stock as he might lawfully have used the money, and that for

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such a course the defendant would not be liable in an action of tort. As these statements were contradictory, it came within the province of a jury to decide which was the contract between the parties; and the judge could not take that question from the jury. The offer to show that before this transaction shares had been deposited with the defendant, and he had hypothecated the same, and that such use of the stock was communicated to the plaintiff, who made no objection thereto, should have been admitted, as showing the construction of the contract by both parties; and was properly for the consideration of the jury in determining what the terms of the contract were.

Although by this contract as stated by the defendant, he had a right to use this stock in the same manner as the cash, if that had been deposited, he was bound by his contract to return the stock whenever the plaintiff tendered the amount due to the defendant, for which it had been pledged. When the tender was made, it was the duty of the defendant at once, or within a reasonable time, to have restored the stock. This he failed to do, and the plaintiff was entitled to recover, on the contract, its value. But if the defendant, by the contract, had the right to use the stock, by hypothecation, there was no tort committed by the omission to restore it, and the plaintiff's remedy was on the contract, and not for the conversion.

The verdict should be set aside and a new trial ordered.

GEO. G. BARNARD, J., concurred.

CARDOZO, J. (dissenting.) I think the offers on the trial, on the part of the defendant, were properly excluded. The transaction made him a pledgee of the stock, and evidence of custom is not admissible to change his liabilities and duties as such. • (*Markham v. Jaudon*, 41 N. Y. 236.)

But the court erred in directing a verdict for the whole

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amount of the value of the stock. The plaintiff was indebted to the defendant upon the transaction upon which the stocks were pledged, in \$11,600.22, and that amount should have been deducted from the recovery which the plaintiff would otherwise have been entitled to. (*See Leslie v. Hoffman, Edm. Select Cases, 475.*)

If the plaintiff stipulates to deduct that sum, the exceptions should be overruled, and judgment for the difference ordered on the verdict; otherwise a new trial should be ordered.

New trial granted.

[FIRST DEPARTMENT, GENERAL TERM, at New York, February 7, 1871.
Ingraham, P. J., and Cardoso and Geo. G. Barnard, Justices.]

HEINEMANN and another vs. HEARD and others.

Where agents abroad are vested with a discretion, both as to quality and price, in making purchases of teas and silks, for their principals in this country, they are not liable for a failure to purchase, without more proof than the mere fact that some purchases were made, during the time, by other dealers, within the limit.

Under such instructions, it should appear that the agents not only could have purchased, but that knowledge of the opportunities of making the purchases was brought home to them, and that their omission to purchase was willful, and not the result of an ordinary degree of discretion and prudence on their part.

APPEAL by the plaintiffs from a judgment at the circuit dismissing the complaint.

The plaintiffs were merchants doing business in the city of New York. In the year 1864, they commenced a correspondence with the defendants, who were merchants in China, and on the 23d of December, of that year, gave them an order to invest £10,000 in "fair cargo Foochow Oolongs," (teas,) "at a price not exceeding 9d. sterling

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per lb. free on board, packed in half chests; and £5000 in No. 1 re-reeled silk, if possible all white, at 18s. for Cumchuck, or at 16s. for No. 1 Loong Kong or Kow Kong, free on board," in accordance with the terms of a letter of credit of J. S. Morgan & Co., bankers of London, which letter of credit was dated January 10th, 1865, for shipment of property from China to an Atlantic port in the United States, and required the bills to be drawn in China prior to July 1st, 1865, and advice thereof given in duplicate; "such advice to be accompanied by bill of lading filled up to order, with abstract of invoices indorsed thereon, one copy of the same to be sent to Messrs. Dabney, Morgan & Co. of New York, by the ship. The receipt of these instructions and letter of credit was acknowledged by the defendants in a letter dated February 25th, 1865, in which they said they considered it very improbable that they would be able to use the credit for some time, as prices of both tea and silk were so far beyond the limits of their instructions. May 2d, 1865, the plaintiffs again wrote the defendants, saying: "With this, we would authorize you that in case you see no chance of filling our orders, to substitute the Oolongs by fine Moyune teas, either from Canton or Shanghai, the usual assortment of fully fair cargo, at a price of 1s. 7d. sterling per pound, free on board, without freight and insurance; for the Ting Tai 2d. per pound higher. The silk we should like to get, even at a difference of five per cent above our limit." This letter was received in Hong Kong July 7th, 1865, and its receipt acknowledged by a letter dated on the 10th July, 1865, in which the defendants say that the market for Oolongs had not yet opened, and that it was almost too early to be able to predict the course of the markets and the range of prices; that they had endeavored to make contracts for silk within limits, but that dealers were unwilling to make any settlements until they could see the quality of the next crop, which would be shown before long.

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On the 2d of March, 1866, this action was commenced against the defendants for the recovery of \$85,000, with interest from March 2d, 1866, upon allegations that in the months of June and July, 1865, they could have invested £5000 sterling at the market rates then ruling in the Chinese market, in re-reeled silk, as directed by the plaintiffs' letter of December 23d, 1864, and within the limits and under the conditions therein contained, as the defendants well knew, and could have shipped the same to the plaintiffs as therein directed, but wrongfully omitted and neglected to do so. And that during the month of July, 1865, the defendants could, at the market rates then ruling in the Chinese markets, have invested £5000 sterling of the said credit in re-reeled silk, as directed by the plaintiffs' letter of December 23d, 1864, and within the limits and under the conditions therein contained, as modified by the plaintiffs' letter of May 2d, 1865, as the said defendants well knew, and could have shipped the same to the plaintiffs, as therein directed, but wrongfully omitted and neglected so to do. That in July and August, in the year 1865, the defendants could, at the market rates then ruling in the Chinese markets, have invested the amount of the said credit in *fine* "Moyunc teas," as directed by the plaintiffs' letter of May 2d, 1865, within the limits and under the conditions therein contained, as the defendants well knew, and could have shipped the same to the plaintiffs as directed, but wrongfully omitted and neglected to do so.

The defendants filed their answer to this complaint, denying that they could, before the expiration of the letter of credit, have invested the £5000 in re-reeled silk within the limits and under the conditions prescribed by the plaintiffs; or, if such investment could have been made, that they had any knowledge or information that such could have been done; and denying that they could have shipped the same to the plaintiffs at any time during the

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period of the alleged letter of credit. The same denial is made in relation to the investment of £10,000 in fine Moyune teas.

The issues raised by the pleadings came on for trial at the New York circuit, on the 5th of May, 1869, before Justice CARDOZO and a jury.

After the counsel for the plaintiffs had closed their evidence—consisting of letters, depositions, circulars, invoices, oral testimony, and *pro forma* statements—the defendants' counsel moved to dismiss the complaint, on the ground that the plaintiffs had failed to make out a *prima facie* case sufficient to go to the jury; which motion was sustained by said justice, who ordered that the complaint be dismissed.

To this decision the appellants excepted, and appealed to the general term.

W. W. Macfarland, for the appellants.

E. W. Stoughton, John E. Ward and *Wm. S. Dexter*, for the respondents.

By the Court, INGRAHAM, P. J. We do not deem it necessary to the disposition of this case to discuss particularly the evidence given on the trial. After an examination of that evidence, we think that some general principles applicable to it will dispose of the questions raised on this appeal.

In regard to the orders to purchase teas, the same were purely discretionary on the part of the defendants, requiring the exercise of their judgment both as to the kind of tea and its quality. The first orders were to purchase Oolongs at a limited price. If desirable purchases of this kind of tea could not be made, the orders authorized purchases of fine Moyune teas, under certain limits as to quality and price. This was as late as May, 1865, and not

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received till some time thereafter, when the date of the credit was to expire July 1st, although afterwards extended to September 1st, while on the 6th of June 1865, a letter was sent authorizing the first credit not used to be applied for joint account.

We think no other conclusion in regard to this correspondence could be arrived at, except that the intent was to vest in the defendants a degree of discretion, both as to quality and price, in making the purchase, which could not, under the evidence given, render the defendants liable for neglect to obey orders of the plaintiff, without much further proof than can be found in this case.

In regard to the purchases of silks, the same discretion was given to the defendants. In December, 1864, after stating quality and price of silks, the plaintiffs continue: "The selection of silk and tea we leave to your discretion." In May, 1865, they were authorized to ship other grades, at their discretion, which they might consider equally desirable for this market. Such silks as were required had to be ordered for weeks in advance, and the evidence does not show that such silks could have been contracted for before the month of June following, while the limitation of credit expired in July. So also, when the price fell to the limit in June, owing to unfavorable news from Europe, the defendants thought it best to delay purchases on that account until, by the next arrival, news of a reaction had taken place, and the price went beyond the limit. From all the evidence in the case, we think the defendants were vested with a discretion in making purchases, both of silks and teas, which exempted them from liability for not purchasing, without more proof than the mere fact that some purchases were made during the time by other dealers, within the limits.

Under such instructions as were given to these defendants, it should appear that they not only could have purchased, but that the knowledge of the opportunities of

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making the purchases was brought home to the defendants, and that their omission to do so was willful, and not the result of an ordinary degree of discretion and prudence on their part. We think the evidence on this branch of the case was insufficient to establish any liability against the defendants.

Judgment affirmed.

[FIRST DEPARTMENT, GENERAL TERM, at New York, February 7, 1871.
Ingraham, P. J., and Geo. G. Barnard, Justice.]

EDWIN HOYT and others vs. PETER R. BONNETT and others, Executors, &c., and others.

The statute does not limit the claims to be presented to executors by creditors, to such as are due. Whether due or not, if there is an intention to make a claim against the estate, notice of that claim should be presented, and if it be not due, the statute (2 R. S. 96, § 74,) points out the course to be pursued, upon the accounting.

Executors may select a place as their place of business or residence, so far as their relation to the estate is concerned; and the designation, in a notice published in the newspapers, of a place where claims of creditors, against the estate, shall be presented, makes that the residence or place of business of the executors, for that purpose, within the meaning and object of the statute. (2 R. S. 88, § 84.)

The decision to the contrary, in *Murray v. Smith*, (9 Bore. 689,) disapproved. Where executors, on the presentation of a claim against the estate, to them, positively declined, in writing, to pay the same; *Held* that this amounted to a rejection of the claim; although they, at the same time asked for a bill of particulars, and a list of vouchers.

Held, also, that the executors did not, by stating that they would be "greatly obliged" for a bill of particulars, &c., qualify their refusal to pay; they making no promise, and giving no intimation that their action would be altered by such a bill, if one were sent.

And that if the claimants neglected to furnish any bill of particulars, they could not claim that the demand for one was a qualification of the previous rejection.

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THIS is an appeal from a decree of the surrogate of the county of New York, settling the accounts of executors and ordering payment of legacies.

The question presented by the case was whether the claims made by the appellants were barred by the statute, by reason of the omission of the claimants to commence suit thereon within six months after the time when the same were rejected by the executors, or after they became due.

Augustus Whitlock, of the city of New York, died prior to September 20, 1866, leaving a last will and testament, which was duly admitted to probate, and on the last mentioned day letters testamentary on the said will were issued by the surrogate of New York, to Daniel Whitlock and Robert C. Gwyer, two of the executors therein named, and on September 22, 1866, to Peter R. Bonnett, the other executor therein named. The testator was, at the time of his death, a copartner in the firm of Whital, Le Fevre & Co. of Waterbury, Connecticut. This firm of Whital, Le Fevre & Co. was solvent, and the interest of the estate therein was sold by his executors to Wm. H. Bonnett, one of the legatees under the will, for \$50,000. The testator, Augustus Whitlock, was also a copartner in a manufacturing corporation called Glenville Mills, Glenville, Connecticut. Hoyt, Spragues & Co., the appellants herein, had an account as factors and commission merchants, with Whital, Le Fevre & Co. for moneys advanced on woollens consigned to them by Whital, Le Fevre & Co., and on July 1, 1867, claimed a balance of account thereon of \$507,501.65, against which they held cloth goods unsold amounting to about 270,000 yards in quantity, the proceeds of sale of which were applicable to the said balance of account. They had also an account for moneys advanced to the Glenville Mills, amounting, July 1, 1867, to \$5115.21. On April 4th, 1867, the executors of Augustus Whitlock obtained from the surrogate an order "that the

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said executors insert a notice once in each week, for six months, in the *New York World* and *New York Transcript*, requiring all persons having claims against said deceased, to present the same, with the vouchers thereof, to said executors, at their places of residence or places of transacting business, to be specified in such notice, on or before a day therein mentioned," &c. The executors, respectively, resided in the city of New York, and carried on business therein, and each had a place of business in said city, as follows: Peter R. Bonnett resided at No. 6 East Twelfth street, and had a place of business at No. 52 Vesey street; Daniel B. Whitlock resided at No. 218 West Twenty-eighth street, and had a place of business at No. 46 South street; and Robert C. Gwyer resided — Irving Place, and had a place of business at the corner of Old Slip and Front street. The only notice published by the executors, pursuant to said order of April 4, 1867, was in the following words:

"In pursuance of an order of the surrogate of the county of New York, notice is hereby given to all persons having claims against Augustus Whitlock, late of the city of New York, deceased, to present the same, with vouchers thereof, to the subscribers, at the office of Messrs. Amherst Wight & Son, No. 119 Broadway, in the city of New York, on or before the eleventh day of October next.

Dated New York, the 5th of April, 1867.

DANIEL B. WHITLOCK,

ROBERT C. GWYER,

PETER R. BONNETT,

Executors."

Hoyt, Spragues & Co., on October 8, 1867, sent to the office of Messrs. Amherst Wight & Son, directed to said executors, notices of their claims against the estate of Augustus Whitlock. Each claim was for "balance of account for moneys advanced" to the firms above mentioned, in which the testator was a partner; and was verified by

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an affidavit stating that the claim was "justly due and owing" to the claimants. On November 9, 1867, the executors served on Hoyt, Spragues & Co. a notice, of which the following is a copy :

"To HOYT, SPRAGUES & Co. :

Gents.—You are requested to take notice, that the executors, &c., of Augustus Whitlock, as at present advised, decline to pay your claims against the estate of Augustus Whitlock for \$5115.21, and for \$507,601.65, presented to the attorneys for said executors, and filed with them on the 8th day of October, 1867.

Having no other means of procuring information concerning the details of said claims, they will be greatly obliged if you will furnish them a bill of particulars containing the items of your accounts, the dates when contracted, and a list of the notes or other vouchers which you hold for the same.

New York, November 9th, 1867.

P. R. BONNETT,
ROBERT C. GWYER,
D. B. WHITLOCK,
Executors."

On June 11, 1869, the executors presented to the surrogate a petition for a final settlement of their account as executors. In the petition, which was verified by the oath of the executors, Hoyt, Spragues & Co. are named among the persons interested in the estate as "creditors, legatees, next of kin, or otherwise." Hoyt, Spragues & Co. were duly cited as persons so interested, to appear on the final accounting on July 19, 1869. Hoyt, Spragues & Co. appeared, pursuant to citation, and it then appearing that the executors had omitted their claim in the account, and claimed that it was barred and extinguished, as a claim which had been disputed and rejected, and on which no action had been commenced within six months from

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the date of its rejection, Hoyt, Spragues & Co. duly objected to the account on the ground of such omission. It was claimed before the surrogate, on the part of Hoyt, Spragues & Co., that they were creditors of the estate, having a claim not yet liquidated, and ascertained as to amount, but which would become liquidated and due so soon as the consigned goods in their hands were sold; that the claim had never been so disputed or rejected as to be barred by statute for non-commencement of suit within six months after notice, and that no sufficient notice had ever been given to set the statute in motion. The executors claimed that they were entitled to a decree for final accounting and distribution, without reference to the claim of Hoyt, Spragues & Co., on the ground that the claim was barred by the statute, as a rejected claim, on which no suit had been commenced within six months after its rejection. The surrogate overruled the objections, and proceeded to pass the executors' accounts, and to decree distribution, without reference to the claim of Hoyt, Spragues & Co. And from such decree Hoyt, Spragues & Co. appealed to the general term of this court.

Wm. A. Butler, for the appellants.

I. The undisputed facts appearing before the surrogate by the allegations and proofs of the parties, respectively, upon the proceedings for the accounting, showed that a claim existed in favor of Hoyt, Spragues & Co. against the estate of the deceased, to a large amount, which was not then due. It was, therefore, the duty of the surrogate to have ascertained and allowed a sum sufficient to satisfy the claim, or the proportion to which it was entitled, to be retained by the executors, pursuant to the provisions of section 74, article 3, chapter 6, part 2 of the Revised Statutes; (2 *R. S.* 96;) or he should have suspended the accounting and distribution, pursuant to the provisions of section 64 of the same article, until the claim was

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liquidated and adjusted. 1. The claim was not due. It was for factors' advances on consigned goods, which had not been sold, and the proceeds of which were applicable to the liquidation of the account. It is well settled that where a commission merchant makes advances on goods consigned to him for sale, the proceeds of the consigned property are the primary fund to which he must look for reimbursement, and it is incumbent on him to show that the fund is insufficient, before he can recover against the consignor personally. (*Gihon v. Stanton*, 9 N. Y. 476.) 2. The claim as presented was not for any debt due, but was a statement of the cash advances as made, and of the property in hand to meet the same. No suit could have been commenced on the claim, as it could not be ascertained whether any or what balance would be due to Hoyt, Spragues & Co. at the close of the transaction, so long as the goods remained unsold. It was therefore the duty of the surrogate to have provided for the claim as required by section 74, above cited, or to have suspended the accounting, as provided by section 64. Section 64 provides that the hearing of the allegations and proofs of the respective parties may be adjourned from time to time as may be necessary, &c. (2 R. S. 94, § 64. *Curtis v. Stilwell*, 32 Barb. 354, 356.)

II. The claim was not barred or affected by the provisions of section 38, article 2, chapter 6, part 2, of the Revised Statutes, inasmuch as no part of the debt was due at the time of the supposed rejection of the claim. It is substantially conceded by the surrogate that the demand of Hoyt, Spragues & Co. was simply a "claim," and not a "debt," and yet in his decision and decree he treated it as a debt barred by the statute. This was plainly error.

III. Even if the provisions of section 38 applied, the claim was not "disputed or rejected" by the executors, within the meaning of the law, so as to set the six months statute of limitations in operation. 1. The notice was

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to the effect that the executors, as at present advised, declined to pay the claim, and requested further particulars, vouchers, &c. There was no dispute or rejection, so as to notify the claimants that the executors intended to set the statute in operation against them, or not to admit the claim against the estate as a claim. 2. If through inadvertence, or for any cause, Messrs. Hoyt, Spragues & Co. neglected to furnish the further particulars, the executors could then, for want of them, have disputed or rejected the claim. But as yet they have not done so. They stand on the record asking information about the claim. This is wholly inconsistent with the notion that they disputed or rejected it. That would depend on their further decision after receiving the particulars. They could not in the same breath say, "we dispute and reject the claim," and "we request a bill of items." 3. The authorities are uniform in holding executors very strictly to the requirements of the statute which limits rights of action, and to make it applicable, there must be a positive and explicit dispute or rejection. (*Barsalou v. Wright*, 4 *Bradf.* 164. *Elliot v. Cronk's Adm'rs.*, 13 *Wend.* 35. *Kidd v. Chapman*, 2 *Barb. Ch.* 414. *Reynolds v. Collins*, 3 *Hill*, 36.) 4. It is evident, by the terms of the notice, that the executors proceeded under section 35, which authorized them to require vouchers in support of the claim. (2 *R. S.* 88, § 35.) The failure to furnish vouchers might have justified them in rejecting the claim for that reason, as above conceded, or in calling for a reference as provided by section 36, (2 *R. S.* 88, § 36,) but they were not at liberty to hold the question of allowance or rejection in abeyance until the final accounting, and after citing the claimants as creditors, to ignore their claim as barred by statute, and procure a decree of the surrogate adjudging it to be so barred, (*Tucker v. Tucker*, 4 *Keyes*, 146, 148.)

IV. The statute did not apply, inasmuch as no sufficient notice for the presentation of claims had been given

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by the executors, in pursuance of the surrogate's order of publication. 1. The notice published was not a compliance with the statute, or with the surrogate's order, as it did not require the claims to be exhibited at the "place of residence" or "place of business" of either of the executors. This is a fatal defect. (2 R. S. 88, § 34. *Murray v. Smith*, 9 Bosw. 689.) 2. The fact that Messrs. Hoyt, Spragues & Co. presented their claim pursuant to the notice, did not prevent them from objecting that the notice was insufficient under the statute. The executors invoked the aid of the statute to destroy the claim upon grounds which rested solely upon proof to be made by them of a strict pursuance of the statute. Every fact thus became jurisdictional, and this being the case, they must make out a case of complete compliance with the statute. In such cases consent cannot confer jurisdiction or aid the statute. "The law, and not the consent of the parties, confers jurisdiction, and that rule could have no practical force, if consent, given in whatever form, could preclude inquiry as to the lawfulness of the jurisdiction." (*Per Johnson, J., in Beach v. Nixon*, 9 N. Y. 36. *Tucker v. Tucker*, 4 Keyes, 136. *Dudley v. Mayhew*, 3 N. Y. 9. *Garcie v. Sheldon*, 3 Barb. 232.) 3. The surrogate therefore erred in holding that the order to advertise, and the notice under such order, "were not jurisdictional points," and that the only jurisdictional question for the surrogate was the disputing or rejection of the claim. The statutory limitation is only applicable to cases where the rejection of the claim is after the publication of a sufficient notice, as authorized by section 34. (*Whitmore v. Foose*, 1 Denio, 159.)

V. The surrogate having no jurisdiction to try the claim, if disputed, (*Magee v. Vedder*, 6 Barb. 352; *Wilson v. Baptist Ed. Society*, 10 id. 308; *Disosway v. Bank of Washington*, 24 id. 60; *Curtis v. Stilwell*, 32 id. 354; *Andrews v. Wallege*, 17 How. 263; *Tucker v. Tucker*, 4 Keyes,

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136;) and the executors having failed to take such action under the statute as to extinguish and bar the claim, it was error in the surrogate to adjudge it barred, and to permit the executors, on that ground, to distribute the estate without reference to it. He should have adjudged the claim to be an undisputed one, or have required the executors, by proper proceedings under the statute, to place it in a position for adjudication, and have suspended proceedings in the mean time. (See point I.)

VI. The decree of the surrogate should be reversed, and the cause remitted to the surrogate for further proceedings.

C. A. Peabody, for the respondents.

The principal questions to be considered are, 1. Whether the notice by the executors to persons having claims against the deceased, to present them to the executors, published under an order of the surrogate, was regular and sufficient in law. 2. Whether the claims presented by the appellants were rejected or disputed—that is, whether the answer made by the executors amounted to a rejection or disputing of the claims. And, 3. Whether the claims presented were for money not then due. The only objection made to the notice given by the executors is that it does not call on claimants to present their claims at the place of residence or of transaction of the business of the executors.

I. The notice published was sufficient. It was a notice to present claims at a place designated by the executors as the "place of transaction of business." They had the right to designate their place of transacting business, and the place so designated became, *ipso facto*, their place for the transaction of business. The statute does not mean that they must designate a place at which they transact other business. It is sufficient that it is their place for the transaction of this business, and as to that, it is made

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the place for this business by their designation of it to that end.

II. The language of the statute is, "any executor or administrator * * may insert a notice * * requiring all persons having claims to exhibit them to such executor or administrator * * at the place of his residence or transaction of business." * * (3 *R. S.* p. 175, § 39, 5th ed.) What was the place of residence of these executors? In this case there were three executors—not one, as the statute seems to contemplate. The statute says *his*, "contemplating only one executor," and makes no provision for more than *one*. Of course, the right to give such notice is not limited to the case where there is but one executor. It applies equally to a case where there are more than one.

III. The notice must be to exhibit them at the place of residence or transaction of business of the three executors giving the notice, and not at that of any one of them. 1. The three executors had no place of residence. Bonnett resided at No. 6 East 12th street, Whitlock at No. 218 West 28th street, and Gwyer at No. — Irving Place. Each one had a place of residence. The three had no place of common residence. 2. They had no place for the transaction of business—no other place common to them all. Bonnett was a grocer at 52 Vesey street. Whitlock was treasurer and book-keeper at 46 South street. Gwyer was a merchant, corner of Old Slip and Front street. As to their usual avocations, these executors had no place of business. The three had no place of business except the office designated in the notice.

IV. The office of Messrs. Amherst Wight & Son was a place of business to them, and was the only place of business of them. 1. One executor may fix his own place of residence or transaction of business. 2. Three, unless they reside together, cannot fix their place of residence—they have no place of residence. They must designate a

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place of business, not of one of them only, but of all. An executor must designate *his* place of residence or transaction of business. A plurality of executors must designate *their* place of residence or transaction of business; not that of one of them, but that of all. 3. These executors had a place of business common to them all, the office designated, and they had no other common to them all. This was their place of transaction of business not only. It was their place of business of this estate especially, and peculiarly their place for the transaction of business of this kind, relating to this estate, business semi-legal, or having questions to be considered and decided under advice and direction of counsel. Suppose that these executors had had no place of residence or business within the State, had been non-residents and without other business here? In such a case how could they have fixed their place of residence or transaction of business as the place where these claims should be exhibited? As non-residents, could they have fixed their places of residence or transaction of their business generally—out of the State or remote from it perhaps—as the place for these claims to be exhibited? Must they so fix it? That is what the argument of the appellants requires. Executors are frequently non-residents of the State, and have no place of residence or of business within it. They cannot fix a place out of the State, and remote from it, it may be. In such a case he or they cannot fix his or their place of residence or business—outside the State—as the place to exhibit claims; that is plain. Where a sole executor, or all of several executors, reside out of the State, and have no place of business within it, they must designate a place within it. They must designate some place of business within the State; and doing so, they make it thereby, *ipso facto*, their place for the transaction of business, within the proper meaning of the statute. The place “of transaction of business” of these executors is, for the purpose

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under consideration, the place designated by them for the purpose. It need not be the place of transaction of other business, or of their business generally. Any place, being designated by the executors as the place for their business, becomes, within the statute, the place for the transaction of this business, and the demand of the statute is complied with. If there were a doubt whether the place were within the terms of the statute, claimants could not avail themselves of it, because they have accepted it as correct, and acted on it as being so. They have presented their claim at the place designated, and they cannot now assert that that is not the proper place for the purpose. This would cure the error, if any had existed in the notice. The case of *Murray v. Smith*, (9 Bosw. 689,) is not an authority in point. In that case there was only one executor. He had one place of residence and one place of business. It was possible, therefore, to specify his place of residence or place of business in the notice. In this case there are three executors, having three separate places of residence and business, as to their general business. No one of them, nor all three of them of either class, or the six of the two classes, could properly be specified. The application of the rule stated in this case was therefore impossible. Besides this, in *Murray v. Smith*, the claim had not been presented at the place named, and there was no evidence that notice had practically reached the claimant; while in this case notice is shown, and the claims have been presented at the place named in it, and have reached the executors and been acted on by them. In that case there was an effort to charge the creditor with constructive, without proof of actual, notice. This is a case of admitted actual notice. It is too late to object to the place named, after they have availed themselves of the notice and complied with it. They are estopped to repudiate their own action. The case of *Murray v. Smith*, moreover, is only a special term decision, and in no respect binding on this court as now constituted. It

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has no intrinsic merit to commend it, and would not be followed even if it were directly in point. The claim of Messrs. Hoyt, Spragues & Co. was duly presented at the place designated in the notice, the office of Messrs. Amherst Wight & Son, addressed to the executors. It was delivered to the executors at that office, and by them received on or about the 8th day of October, 1867. This shows at least that the error in the notice, if there was one, has done no harm. The presentation of the claim cured the error, if there was one, as a general appearance cures a defect in the service of process, or a compliance with any other requisition is a waiver of objection to the correctness of it.

V. The claims were "rejected" or "disputed." The rejection, or notice that the executors declined to pay, was in writing, and very full. The language is, "take notice that the executors * * * decline to pay your claims for \$5115.12, and for \$507,601.65." "The executors * * * decline to pay your claims," &c. This is a rejection of them. It is also a disputing of them. A refusal to pay, and notice that they will not pay, is all that executors can give claimants, in the way of the rejection of claims. It is the only objection they are competent to make. "We reject your claims," or "we dispute your claims," would not be anything more. It would only be a notice that they would not pay. That is the practical fact of rejection.

VI. The claim as made and presented is due, and was so when it was presented. 1. The statements therein are of a debt due. The language is of the present time. 2. They are both for balances of account. There is no presumption that a sum stated to be owing, as being balance of account, is not yet due. The reverse is the presumption. A claim for balance of account is a claim of a sum already due, unless the contrary appear. 3. The presumption is greatly strengthened in the case of a claim against the estate of a deceased person. 4. In case of a

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claim made pursuant to notice to présent claims, which notice can in no case be given until more than six months after the executors or administrators have qualified, the presumption is much stronger than in another case. 5. In this case the order bears date April 4, 1867. It recites that more than six months had elapsed since the executors were appointed. The claims were presented October 8, 1867, more than six months after the date of the order. Of course, at the time of the presentation of the claims, more than a year had elapsed since the death of the testator. 6. In point of fact, more than seventeen months had elapsed since the death of the testator, who died May 4th, 1866. 7. The claims are both of them for balances due on mercantile transactions, in which credit of great length is seldom if ever given, and the presumption must be strongly against it in this case.

VII. The burthen is not on the executors to show that the objectors' claim is due. The burthen is on the objectors to show that their claim is not due. 1. A claim made must be presumed to be due unless the contrary appears. The objectors know what their claim is, and whether they claim it is due or not. 2. The knowledge of the fact is necessarily with the claimants, and is not with the executors. Whether they claim that the debt asserted by them is due, is almost a mental operation of their own, and can hardly be known to another. One who denies and is ignorant of the existence of the whole thing, surely cannot be held to a minute knowledge of its qualities and characteristics in detail. The executors are not supposed to have any knowledge or means of knowing about a claim they reject, and they are not bound to know about it.

VIII. But the executors have not only disputed and rejected the claim, they have also called for further information respecting it. They have demanded the "satisfactory vouchers in support thereof," contemplated and authorized

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by the statute, (3 R. S. 175, § 40, 5th ed.) and this demand has not been complied with. The statement as presented gives no information at all, except a gross sum, which is not pretended to be the measure of the claim. Did the claimants—these objectors, the only source of information on the subject—comply with the request, and give them the information desired? It is not pretended. Of course the objectors knew that this answer was a refusal. The executors appealed to the claimants for information, saying they had no other means of information. The claimants refuse to give the information, and it follows that the executors have none, and that the objectors knew that fact. The objectors therefore are wantonly in default in withholding the information called for.

IX. The knowledge of the executors was that derived from the statement that claims were for loans and advances of money made to the firm. That the firm had been dissolved at least more than a year, and about 18 months before, the deceased having been dead about that time, but in point of fact it was dissolved long before his decease. It states claims, and without saying expressly whether they are due, leaves the impression that they are. They are stated as claims *in presenti*. Nothing in them indicates that the claims are not due. If they were to become due at a future time, that fact should have been stated. They were made up to July, 1867. That suggests that they were due, at any rate, before that time.

By the Court, CARDOZO, J. The appellants, in their proceeding to review the action of the surrogate, have themselves characterized their claim against the estate as a debt due and owing. It is most likely that they were right in so regarding it, though it is not consistent with the ground upon which they ask us to reverse the surrogate's decision. But I do not think it necessary to determine that point. The statute does not limit the claims

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to be presented to the executors, to such as are due. Whether due or not, if there is an intention to make a claim against the estate, notice of that claim should be presented; and if it be not due, the 74th section of the statute (2 R. S. 96) points out the course to be pursued, upon the accounting.

It is objected that the notice to present claims was insufficient; and the case of *Murray v. Smith*, (9 Bosw. 689,) a special term decision, by Justice Robertson, is relied upon. We think that decision cannot be sustained. The executors may select a place as their place of business or residence, so far as their relation to the estate is concerned, and the designation, in the notice, of a place where the claims shall be presented, makes that the residence or place of business of the executors, for that purpose, within the meaning and object of the statute.

The next question is, the claim having in fact been presented to the executors, did they reject it? I think they did. They declined to pay the claim, which was certainly a rejection or dispute of it. Their declination was not contingent. It is true, they asked for vouchers; but although they did so, they at the same time absolutely declined to pay. If, after that, the claimants wanted any further action, any reconsideration of the subject by the executors, they should have re-opened the matter by some communication, and if the executors had then discussed the matter, it might be that the rejection could not be considered as final. (*Barsalou v. Wright*, 4 Bradf. 164.) But nothing of that kind occurred. The executors did not, by stating that they would be "greatly obliged" for bill of particulars, &c., qualify their refusal to pay. They made no promise, and gave no intimation that their action would be altered by such a bill, even if one were sent. But none was sent. And giving to the notice of rejection the most liberal construction which the appellants can claim, its meaning could not have been more favorable to

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their view than this: "We reject your claim. If you want us to reconsider this, send further information." When thus notified, the appellants in effect say, we have no further information to give; and as the notice fully apprised them that, as things then stood, the claim was rejected, I think the surrogate was right, and that his decree should be affirmed.

Decree affirmed, with costs.

[FIRST DEPARTMENT, GENERAL TERM, at New York, February 7, 1871.
Cardozo and Geo. G. Barnard, Justices.]

BIGLER vs. FURMAN & PHELPS.

It is well settled in this State that a tenant cannot dispute the title of his landlord, unless some change has taken place in the landlord's title subsequent to the taking of the lease.

The only case in which a tenant who has not entered on the premises may set up want of title in his landlord, is where he was induced to accept possession, or to enter into the lease, by fraud or mistake.

APPEAL from an order sustaining a demurrer to the defendants' answer.

This action was brought upon an indenture of lease, made and executed on the 9th day of June, 1865, by and between the plaintiff and defendants, whereby the former let to the latter certain premises therein described, from the 1st day of July, 1865, for the period of five years; at a rent agreed upon. The complaint simply alleges the making of the lease, and the non-payment of the installment of rent for which the action is brought.

The answer admits the execution of the lease, and that nothing has been paid upon it. It also alleges that the defendants were led and induced to believe that the plain-

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tiff was the owner of the premises in question, and had full right to let and demise the same. That being so led and induced, &c. on the part of the plaintiff, the defendants executed the lease. That the plaintiff was not the owner of the premises at the time of the execution of the lease, or at any time since, but the same then belonged and still belongs to the State of Virginia and to other persons to the defendants unknown, and the defendants have never been in possession thereof, but that other persons were in possession at the time aforesaid, and have ever since continued in possession. The answer further, and by way of counter-claim, alleges the making by the plaintiff of the covenant of quiet possession, and the breach thereof, following in this respect the language of the covenant. It then alleges that the premises in question belonged, at the time of the making of the agreement, and have ever since belonged to the State of Virginia, and to other persons unknown to the defendants; that the owners were in possession thereof at the time of said agreement, and have ever since continued in such possession, and these defendants have not, nor has either of them, been able to obtain possession of said premises, or of any part thereof. The answer then alleges damage, and demands judgment to an amount exceeding that claimed in the complaint. The answer being demurred to, the demurrer was sustained; and from the order sustaining the demurrer and the judgment entered thereon, this appeal is taken.

Scudder & Carter, for the appellants.

I. The condition of every agreement on the part of a lessee to pay rent is the enjoyment, or the right of enjoyment on his part, of the premises sought to be let by the lease. This is the consideration of his promise, and in case of a failure of consideration, he is excused from the payment of rent. And it is well settled, that it is a good

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defense to an action upon a lease not under seal, that the lessor had nothing in the premises at the time of the lease; for the reason that in such a case the lessee hath not *quid pro quo*, nor anything for which he should pay rent. (*Co. Lit. by Thomas*, 415. *Taylor's Land. and Ten.*, § 629. *Sullivan v. Stradling*, 2 *Wilson*, 217.) And upon the same principle it is equally well settled, that in case the tenant is deprived in whole or in part of the possession of the demised premises, the rent is entirely discharged, or abates in the same proportion. (*Taylor's Land. and Ten.*, § 378.) It is submitted, that the fact of the lease in question being under seal does not change the rule in this respect, nor render a consideration any the less necessary. Whatever may have been the common law rule as to a seal absolutely importing a consideration for every covenant contained in it, the rule is changed by the Revised Statutes, and the only difference in this respect between a sealed and an unsealed instrument, is that in the former there is a presumption of consideration, and the *onus* is cast upon the covenantor to disprove this presumption. The statute provides, that "in every action upon a sealed instrument, and where a set-off is founded upon any sealed instrument, the seal thereof shall only be presumptive evidence of a sufficient consideration, which may be rebutted in the same manner and to the same extent as if such instrument were not sealed." (2 *R. S.* 406.) The present is one of the two cases for which the statute provides; the action is upon a sealed instrument, and within the express language of the statute, the defendants are enabled to rebut the presumption of a consideration, the same as though the lease were unsealed. This they have shown themselves willing to do by raising that issue in their answer. (*Case v. Boughton*, 11 *Wend.* 106. *Russell Rogers*, 15 *id.* 351. *Tallmadge v. Wallis*, 25 *id.* 107. *Wilson v. Baptist Ed. Society of N. Y.*, 10 *Barb.* 308.) The principle that every promise must be supported by a con-

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sideration, applies to those made under seal as well as by parol. The only difference being in the manner of proof; the seal at common law being sufficient evidence of consideration, and by the statute presumptive evidence.

II. It is submitted that the defendants are not estopped from setting up the failure of consideration in their answer. 1. It is to be borne in mind that the action is not brought for use and occupation; on the contrary, it appears that the defendants never had and could not get possession. The equitable estoppel, therefore, which prevents one who has enjoyed the possession of lands, under the lease of another, from denying the latter's title, has no application to this case. 2. To hold the defendants estopped from showing the want of consideration, would render the statute, quoted in the first point, utterly nugatory in actions upon sealed leases. And yet the statute was evidently intended to apply to actions upon leases, as well as other sealed instruments; it provides for *every action* upon a sealed instrument. 3. There can be no estoppel for want of mutuality. Estoppels must be binding upon both parties. (*Welland Canal Co. v. Hathaway*, 8 *Wend.* 480.) The only case, except where there are express recitals, in which a grantor is estopped from denying his title at the time of the execution of a conveyance, is where it is made with warranty; in which case, if the grantor afterwards acquire a good title, he is estopped from alleging that he had no title at the time he executed the conveyance. This is to prevent circuitry of action. (*Sparrow v. Kingman*, 1 *N. Y.* 242. *Fox v. Heath*, 16 *Abb. Pr.* 163. *Pelletreau v. Jackson*, 11 *Wend.* 110, 119. 14 *John.* 193. 1 *Cowen*, 616. 4 *Wend.* 622.) 4. The authorities show that less regard is paid by the courts to a *seal* than formerly, even in cases where the statute before quoted does not apply. It is a matter of notoriety that, in fact, the seal is rarely affixed to an instrument by the person executing it, but that it is attached by some other person before the execution, and

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that there is no more "deliberation and ceremony" in executing a sealed than a parol instrument; and the reason for attaching so much weight to a sealed instrument having practically failed, courts are placing the two classes of instruments more upon an equality. An illustration of this tendency is seen in this very question of estoppels. Thus, where an action was brought against a grantor with warranty, by his immediate grantee, for a breach of warranty, the defendant was permitted to show that the consideration actually paid was less than recited in the deed. The court compares the case to an ordinary receipt, and says that if the latter may be contradicted, why may not the former? (*McCrea v. Purmort*, 16 *Wend.* 460, 472.) While, on the other hand, where the first grantee had conveyed the premises, and the second grantee brought an action against the original grantor on his warranty, the latter was held estopped from denying that the consideration actually received was less than recited in the deed, and the ground of the decision was the same as that upon which parol or equitable estoppels are sustained; that the recital in the deed was a statement on the part of the grantor, that he had received a certain consideration; that the second grantee had changed his position on the faith of that statement, and therefore the former should not be permitted to deny it. (*Greenvault v. Davis*, 4 *Hill*, 643 to 648.) These authorities practically govern estoppels by deed, by the same rules and principles as those *in pais*. Applying those principles to the present case, it will be found not to possess a single element necessary to create an estoppel *in pais*. 5. The most that was ever claimed from the execution of a sealed lease, was an estoppel on the part of the lessee to deny that the lessor had a right to make the lease, and that *some* interest passed under it. It was never held that he could not show that the lessor had not a fee in the premises, so long as he did not claim that he was not authorized to make the lease, and that

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nothing passed under it. So long as he did not deny that *some interest* passed by the lease, he was not estopped to deny that the estate of the lessor was a fee, or any particular estate. "There is no estoppel where an interest passes." (*Doe v. Seaton*, 2 C. M. & R. 728. *Neane v. Mose*, 1 Bing. N. C. 380. 2 *Smith's Lead. Cas.* 692. *Weld v. Baxter*, 36 Eng. Law & Eq. 498. *Brudnell v. Roberts*, 2 Wils. 143. 2 *Saund.* 417.) Now the answer denies that the plaintiff was the owner of the premises, and alleges that the defendants could not obtain possession; that is, they could not obtain possession on the 1st of July, when, by the terms of the lease, they were entitled to possession. But it does not follow from this, that on the 9th day of June, twenty-two days before, when the lease was executed, the plaintiff had no authority to lease. He might well have had the right to lease at that time, and yet his estate failed before the lease became operative; and as he could give no greater rights than he had, the lease must fail. For instance, he may have had an estate for the life of another person, and the latter have died in the *interim*. In such case an interest would have passed by the lease, an *interesse termini*, but nothing for which the defendants should pay rent. An interest having passed, the foregoing authorities, and the reason of the rule, show that the defendants, within the most rigorous rules of estoppels, would be permitted to show that the interest which passed was limited to an *interesse termini*. Otherwise, even had the plaintiff been owner, or had a right to lease on the 9th of June, and had voluntarily disposed of his interest before the 1st of July, the defendants would not be allowed to show it, and might be subjected to the grossest of frauds. The answer does all that is requisite in setting out the facts which constitute the defense—the possession of the premises under a paramount title, and the inability of the defendants to obtain possession or enjoy the premises. (*See Weld v. Baxter*, 36 Eng. L. & Eq. 498.) 6. An

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estoppel is created by the admission of an existing fact, and not by a promissory representation of something to exist in the future; and although the defendants should be estopped to deny the right of the lessor to make the lease on the 9th of June, they could not admit as a *present fact* that there would be no title superior to his on the 1st of July following. 7. In the present case there was no recital of any fact in the lease which the defendants now seek to deny. They have not, in fact, admitted anything which it would be contrary to good morals to permit them to deny. Probably nothing was further from the intention of the parties, when the lease was executed, than that an estoppel should arise. It can be claimed only in pursuance of a very technical rule of law; and it is submitted that a rule working such hardship should not be enforced, unless authorities and legal principles absolutely require it.

III. The damage shown by the breach of the covenants alleged in the answer, and the counter-claim set up because of such breach, is in excess of the amount claimed in the complaint. If, therefore, either the defense set up in the answer, or the counter-claim, is sufficient, the demurrer must be overruled. It is submitted that both the defense set up in the answer and the counter-claim are sufficiently and properly pleaded. The breach of the covenant of quiet possession is assigned in accordance with the most technical rules. The effect of the covenant for quiet possession being against disturbances from those having a legal title only, the answer does not merely follow the words of the covenant and negative them; as, if that were done, the allegation might still be true, without any breach of the covenant, for the reason that the interruption might have been made by trespassers. The answer, therefore, goes further, and alleges the possession of the premises by the owners, which possession was paramount to that of the defendants, and prevented them from entering. (*Marston v. Hobbs*, 2 Mass. 433.) The breach is alleged in accord-

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ance with the provisions of the Code, "in ordinary and concise language, without repetition."

The set-off is clearly good, upon demurrer. The lease contains a covenant for quiet possession, and for a breach of this covenant an action would lie. If the plaintiff should succeed in the present action, he would be liable to suit of the defendants for breach of the covenant; in this action the damages would be at least as much as they had been compelled to pay for the premises, which they never enjoyed and could not enjoy. And thus, after two actions, the parties would be in the same position as before the first suit. The law will not permit this circuitry of action, any more than it will permit a grantor with warranty to recover premises by virtue of an after-acquired title superior to the one he had conveyed with warranty. (*Simpson v. Swan*, 3 *Campbell*, 291. *Carr v. Stephens*, 9 *B. & C.* 758. *Broom's Leg. Max.* 309.) The order sustaining the demurrer, and the judgment entered thereon, should be reversed, with costs.

J. K. Hayward, for the respondent.

I. There are no implied covenants in this lease. (3 *R. S.* 29, 30.) Only an express one for quiet enjoyment.

II. The third averment does not amount to deceit, and so is immaterial.

III. The fifth averment amounts to the plea of *nil habuit in tenementis*, but the defendants are estopped from making this plea, by the familiar rule, that a tenant cannot deny his landlord's title. (*Taylor's L. and Ten.* 629, 705, 706. 6 *T. R.* 62. 7 *Eq. R.* 362.) Technically he is estopped by his deed from pleading *nil habuit, &c.* In 8 *T. R.* 487, the court said: "If a tenant has once recognized the title of his landlord by accepting a lease of him, or the like, he is precluded from showing that the plaintiff had no title when the lease was granted. In *Co. Lit.* 47, b, it is said that "it is a good plea for the lessee to say that the lessor

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had nothing in the tenements at the time of the lease, except the lease he made by deed indented, in which case such plea lieth not for the lessee to plead." In *Jackson v. Rowland*, (6 *Wend.* 670,) the court said: "A tenant cannot dispute the title of the landlord, as long as it remains as it was at the time the tenancy commenced." Cited approvingly in *Despard v. Walbridge*, (15 *N. Y.* 378;) *Vernam v. Smith*, (*Id.* 327; 1 *E. D. Smith*, 143.) In *Kemp v. Goodal*, (1 *Salk.* 277,) the court said: "In debt for rent upon an indenture, if the defendant pleads *nil habuit in tenementis*, the plaintiff need not reply that estoppel, but may demur because the declaration is on the indenture, and the estoppel appears on the record." (*Stroud v. Willis, Cro. Eliz.* 362. *Skipwith v. Green*, 1 *Strange*, 610. 3 *Leon*, 146.) The plea of *nil habuit* is a bad plea for lessee, where there is no covenant of seisin in the lease. If the lessee cannot deny his landlord's title, he certainly cannot set up title in a stranger. The title set up in "the State of Virginia" and "unknown persons," is a deceptive averment, to cover the case of vacant land under water.

IV. The sixth averment is an attempt to plead a breach of covenant for quiet enjoyment. At folio 48 the defendant assigns this breach in negative terms. This is a bad assignment of breach of covenant for quiet enjoyment. (1 *Chitty on Plead.* 369, *m.*) "A general statement that the lessor has performed his agreement or promise, is bad on demurrer, though aided by verdict." A breach of the covenant for quiet enjoyment must be specially assigned. (2 *Mass.* 433. 2 *Bos. & Pul.* 14, *n.* *Bac. Abr. Cov.* 1. *p.* 499.) And the assignment must set up an actual eviction under paramount title. It has long been settled in New York, that actual eviction is absolutely essential to a breach of an express covenant for quiet enjoyment. (*Kortz v. Carpenter*, 5 *John.* 120. *St. John v. Palmer*, 5 *Hill*, 601, *n.* *Mitchell v. Warner*, 5 *Conn.* 622. *Waldron v. McCarty*, 3 *John.* 471. 7 *id.* 258. 11 *id.* 122. 13 *id.* 236. 7 *Wend.*

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281. 9 *id.* 415. 4 *Hill*, 644.) Said Bronson, J., in 5 *Hill*, 601: "If the covenantee never had the possession, it is impossible that there should have been an eviction, and no action will lie, however hard the case may seem to be." The court, in 5 *John*. 120, said: "It appears to be a technical rule, that nothing amounts to a breach of this covenant, (quiet enjoyment,) but an actual eviction or disturbance of the possession of the covenantee," and cited 8 *Co.* 89; *Comyn*, 288. Said Cowen, J., in *Bedoe's Ex'rs. v. Wadsworth*, (21 *Wend.* 120:) "It is said in several cases, (those cited *supra*,) that the covenant of warranty and quiet enjoyment refer emphatically to the possession, and not to the title. The meaning is, that however defective the title may be, these covenants are not broken till the possession is disturbed." Said Bronson, J., in 4 *Hill*, 644: "On an express covenant of warranty, or for quiet enjoyment in a deed, it is settled that there must be a lawful eviction in some form, before an action can be maintained." *Rawle on Covenants*, (p. 240,) says that: "Except where there is some peculiar local construction, it is laid down as a technical rule in every case in which the question has been raised, that the covenants for warranty and for quiet enjoyment are broken only by an eviction." Said the court in *Upton v. Townsend*, (17 *C. B.* 64:) "The term *eviction* is now properly applied to every class of expulsion or amotion. Getting rid thus of the old notion, I think it may now be taken to mean this, not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord, with an intention of depriving the tenant of the enjoyment of the demised premises." The term *eviction* is synonymous with *ouster*. (4 *Mass.* 352.) In 10 *Wheat.* 453, Marshall, Ch. J., said: "The allegation that possession had never been obtained, is immaterial, because not a breach of the covenant, and a majority of the court are disposed to think may be disregarded on a general demurrer." And such, says *Rawle*,

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(p. 253,) was the actual decision, in New York, in the case of *Kortz v. Carpenter*, (5 *John*. 120, and cases there cited.) The defendant's answer is a lame attempt to plead constructive eviction. This is no breach of covenant for quiet enjoyment, in New York. (*See cases supra*.)

V. But the defendant has not even well assigned constructive eviction. 1. He has not averred an elder right of possession, during the life of the lease: *non constat*, that "the owner of the premises" had the right of possession. "An equivocal averment should be construed against him, the pleader." (2 *Hill*, 475. 1 *id.* 71.) 2. The defendant avers no acts of hostility to his possession; no application by himself to the lessor to be put in possession; no effort to get possession; no acts of resistance to lessees taking possession; no adverse title hostilely asserted. At least some of these acts must be averred, in States where constructive eviction is breach of this covenant. (17 *Ill.* 190. 17 *Mass.* 490. 7 *Ala.* 488.) "It seems to be generally settled, that in order to support an action upon a covenant of warranty, there must be something more than evidence of an outstanding paramount title. There must be an assertion of that title, and an ouster or disturbance by means of it. (11 *N. H.* 74.)

VI. The defendant cannot have case, in New York, for damage to foreign realty, even under express covenant. (*Watts v. Kinney*, 6 *Hill*, 82. 23 *Wend.* 484.) The case last cited is on all fours with the defendants' counterclaim, in this action.

By the Court, INGRAHAM, P. J. However harsh and oppressive the rule may be, I consider it well settled in this State, that a tenant cannot dispute the title of his landlord, unless some change has taken place in the landlord's title subsequent to the taking of the lease. In 6 *Wend.* 670, the court says: "A tenant cannot dispute the title of his landlord, so long as it remains as it was at the time the

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tenancy commenced; but he may show that the title under which he entered has expired, or been extinguished." This case was approved in 15 N. Y. 374. In *Vernam v. Smith*, (15 N. Y. 328.) Denio, Ch. J., says: "It has been very often decided, that in debt or assumpsit for use and occupation, the defendant cannot deny the title of the lessor;" and, if the lease be made by deed, this plea cannot be interposed. At common law, where the lease was not under seal, the defense might have been available. See also *Hoag v. Hoag*, (35 N. Y. 469.) Numerous other cases may be found in a note in *Washburn on Real Estate*, vol. 1, pp. 367-369. The only case in which the tenant who has not entered on the premises, may set up want of title in his landlord, is where he was induced to accept possession or to enter into the lease by fraud or mistake. Although some facts are averred in the answer which would go to make up the defense of fraud, there is not enough alleged for this purpose. This may be corrected on amending the answer.

Judgment should be affirmed, with leave to the defendants to amend their answer, on payment of costs.

[FIRST DEPARTMENT, GENERAL TERM, at New York, February 7, 1871.
Ingraham, P. J., and *Geo. G. Barnard*, Justice.]

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IN THE MATTER OF THE SEVERAL PETITIONS OF LAURA E. EAGER, HANNAH ALLEN, ROBERT J. DILLON and others to vacate assessments for paving Irving Place, Nineteenth street and Sixteenth street.

The act of the legislature, of April, 1870, making further provision for the government of the city of New York, (*Laws of 1870, p. 881.*) does not apply to cases which had arisen before the passage of such act; but was prospective only, in requiring the amount erroneously assessed to be deducted. It is erroneous to charge upon the owners of lots assessed for laying a Nicolson pavement, the cost of crosswalks directed by the ordinance, but which have not been actually laid.

A charge of two and one half per cent for collecting an assessment is not erroneous. The statutes give the percentage on the whole amount assessed and collected.

A contract for laying a pavement should not include an allowance to be paid to the contractor for extra compensation in case the work shall be completed before the time fixed by the contract.

THESE several proceedings were instituted under the act of the legislature in relation to frauds in assessments for local improvements in the city of New York, (*Laws of 1858, p. 574.*) to vacate assessments imposed on the property of the respondents for paving Irving place, Nineteenth street and Sixteenth street, in the city of New York, with Nicolson pavement. Each of the assessment lists was confirmed on the 1st day of September, 1869. The resolution and ordinance relative to each street provide that the streets be paved with Nicolson pavement, where not already paved with Belgian pavement, and crosswalks laid or relaid at intersecting streets, under the direction of the Croton Aqueduct department. The Mayor vetoed all the resolutions and ordinances, but the common council passed them over his veto.

On the 26th of April, 1870, the legislature passed an act making further provision for the government of New York, (*Laws of 1870, p. 881.*) section 27 of which (p. 903) reads:

“If, upon the hearing of proceedings brought pursuant

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to the act known as chapter three hundred and thirty-eight of the laws of eighteen hundred and fifty-eight, entitled 'An act in relation to frauds in assessments for local improvements in the city of New York,' passed April seventeenth, eighteen hundred and fifty-eight, it shall appear that the alleged fraud or irregularity has been committed, the assessment shall be vacated or modified as hereinafter provided. If, upon such hearing, it shall appear that, by reason of any alleged irregularity, the expense of any local improvement has been unlawfully increased, the judge may order that such assessment upon the lands of said aggrieved party be modified by deducting therefrom such sum as is in the same proportion to such assessment as is the whole amount of such unlawful increase to the whole amount of the expense of such local improvement. No assessment shall be vacated pursuant to the act hereby amended by reason of fraud or irregularity in the proceedings to collect the same by sale of the assessed premises; but, upon proof of such fraud or irregularity, such sale shall be set aside and the respective rights and liabilities of the assessed persons, and of the mayor, aldermen and commonalty of the city of New York, shall become and be the same as if such sale had not been made."

The contracts for the work were all made with the Nicolson Pavement Company, are all in the same form, and are dated March 31, 1869. In each of the assessment lists a charge is included for the completion of the work inside of the contract time.

In Nineteenth street this allowance is . . .	\$283 50
In Irving place	84 00
In Sixteenth street	168 00

The Nicolson pavement is a patented article, and the Nicolson Pavement Company have the exclusive right to lay the same in the city of New York. The advertisement issued by the Croton Aqueduct department calls for proposals and bids for contracts for Nicolson pavement,

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and no other, in these streets. It was dated July 25, 1868, and the only bid received was from the Nicolson Pavement Company. The charge for collection, in each of the assessment lists, was as follows :

Nineteenth street	\$1248 60
Irving place	667 76
Sixteenth street	613 48

Two and one half per cent was the amount allowed by the ordinance to the collector on all items of assessment collected, and two per cent on all unpaid items of assessment. Each of these charges exceeds two and one half per cent on the items, making up the total assessment, exclusive of the item for collection. Mrs. Eager's property is at the corner of Nineteenth street and Irving place. Mrs. Allen's, corner of Sixteenth street and Irving place. Mr. Dillon's, corner of Fourth avenue and Sixteenth street. Mrs. Eager's lot is 105 feet 8 $\frac{3}{4}$ inches on Nineteenth street and 25 feet on Irving place. Her lot was assessed for paving Irving place \$365.68, for paving on Nineteenth street \$844. Mrs. Allen's lot is 86 feet 4 inches on Sixteenth street, and 20 feet 1 inch on Irving place. It was assessed for paving Irving place \$297.93, for paving Sixteenth street \$708.60. Mr. Dillon's lot is 26 feet on Fourth avenue, and 125 feet on Sixteenth street. It was assessed \$1066.14.

No crosswalks whatever were laid or relaid at the intersection of Irving place and Nineteenth street, or Irving place and Sixteenth street. Before the Nicolson pavement was laid, there were the ordinary crosswalks or bridge stones there, but they were taken up and the Nicolson pavement substituted for them. The charge in the assessment list for bridge stones, in Nineteenth street, was as follows : 772 square feet, at \$1.30 per square foot, making \$1003.60. On Irving place, for 259 square feet of new bridge stones, at \$1.30, making \$336.70. On Sixteenth street, it was for 616 square feet of bridge stones,

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at \$1.30, making \$800.80. The advertisement for proposals for bids did not call for any bids for the work of laying bridge stones or crosswalks.

The cases were argued at the special term before Justice Brady, on the 20th of April, 1870, who rendered the following opinion and decision :

BRADY, J. There are two objections taken to the assessments imposed upon the lands of the petitioners which are well taken.

First. The charge for crosswalks of stone, none having been laid, and none others having been authorized.

Second. The charge for collection in excess of two and a half per cent allowed by law. These charges are legal irregularities within the decisions of this court relative thereto, and the assessments must be vacated under the act of 1858. (*Laws of 1858, p. 574, § 2. Matter of Wood, 51 Barb. 275. Matter of Lewis, 35 How. 162. Matter of Babcock, 23 id. 118. Matter of Beams, 17 id. 459. Matter of Buhler, 19 id. 317. Matter of Astor, N. Y. Trans. Feb. 8, 1869.*) Section 27 of the act of 1870, chapter 383, passed April 26, 1870, might render these objections valueless, but that act was not passed when these applications were heard; has no retroactive effect, therefore; and the irregularities under its provisions cannot be remedied. I have examined all the points submitted in reference to the proceedings for the assessments objected to, and my judgment is that none of them except those embracing the items mentioned are well taken.

I deem it unnecessary to say anything further in deciding these applications, except that the principle upon which the assessment is made is not the subject of review under the act of 1858, (*supra*.) If erroneous it is not a legal irregularity within the meaning of that act. The land of the petitioners and others subject to assessment for the improvement made, may, therefore, be again assessed as

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provided by the act of 1858, (*supra*,) the charge for crosswalks and the charge for collecting, already considered, being excluded from the expenses of the improvement, and the expenses of the new assessments being also excluded.

From the above decision the corporation appealed.

A. J. Vanderpoel, for the appellants.

I. The act of 1870 applied to these proceedings, and the judge, instead of vacating the assessments, should, as to the amount which he adjudged to have been unlawfully increased, have modified the assessment by deducting therefrom such sum as was in the same proportion to such assessment as was the whole amount of such unlawful increase to the whole amount of the expense of such local improvement. This would have done substantial justice to both parties. 1. The operation and effect of the act of 1858, until so modified, was always burdensome and unjust. 2. There is no reason why the act of 1870 should not be held to apply.

II. It was not a valid objection to the assessment that there was a charge for crosswalks of stone when none had been laid.

III. There was no excess in the charge for collection of the two and a half per cent allowed by law. The collector is entitled to a compensation of two and a half per cent upon all moneys collected. The two and a half per cent, to wit, his fees, are as much a charge and lien upon the property as any other item properly and necessarily included in the assessment. The whole amount of money to be paid to the collector must necessarily be included in the assessment, and this whole amount is paid over by the collector to the city treasury and repaid to him therefrom. The statute is: "The collector and the deputy collector shall each receive as compensation for their services, an equal part of two and one half per cent on all items of

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assessments collected by the bureau. * * No moneys, however, collected on any assessment, shall be retained on account of such fees or compensation, but the amount of fees thereon shall be paid monthly on the requisition of the street commissioner to the extent of any moneys which may have been collected and paid into the city treasury, upon such assessment or interest moneys accruing thereon. No moneys collected on any assessment shall be retained on account of the compensation herein provided, but such compensation shall be paid by warrant of the comptroller on the requisition of the street commissioner." (1 *Hoffman's Laws*, 240.)

IV. The proceedings were in all respects regular, and the order should be reversed.

A. R. Lawrence, Jr., for the respondents.

I. The order below was right and should be affirmed.

1. The resolutions and ordinances of the common council, authorizing the laying of Nicolson pavement in Irving place, Sixteenth and Nineteenth streets, express the will of the mayor, aldermen and commonalty of the city of New York, as to the kind of work to be performed, and any item of work not authorized by such resolutions and ordinances and included in the assessment list, as a part of the assessment, vitiates the assessment. It appears from the evidence, that the common council directed that crosswalks should be laid or relaid at the intersecting streets. And it also appears from the evidence that no crosswalks have been laid or relaid, either at the intersection of Irving place and Sixteenth street, or at the intersection of Irving place and Nineteenth street. On the contrary, it affirmatively appears that the old crosswalks at the intersections of these streets, existing at the time the work in question was performed, have been taken up, and that the Nicolson pavement has been substituted for them. Here, then, are eight crosswalks which the common council have

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directed should be laid or relaid, and which the owners of property assessed for the alleged improvement are deprived of. If eight can be omitted, on the same principle eighty can be omitted; and if, under a resolution directing a crosswalk to be laid, a wooden pavement can be substituted for such crosswalk, on the same principle, where the common council directs that a street shall be paved with trap-block or Belgian pavement, such street can be paved with concrete, wood, or an entirely different substance or material. 2. In the case of the *Matter of Wood*, (51 Barb. 275,) where the contract and specifications did not provide for the taking up of gutter stones, and paving in their place with Belgian pavement, but required the contractor to readjust the same, the contractor removed the gutter stones and substituted the pavement. This court, at general term, held that there was no authority for such substitution, and vacated the assessment on that ground. If the court will vacate an assessment because work is performed, and charged for in the assessment list, which is not authorized by the contract, or is in conflict with its provisions, it clearly will vacate an assessment where work is done which is not authorized by, and which is in conflict with, the provisions of the ordinance and resolution directing the street to be paved. 3. It should be borne in mind, in this connection, that the statutes under which these assessments are laid are in derogation of the rights of the citizen; that under them his property may be sold and taken from him. All proceedings taken under such statutes, as well as the statutes themselves, should, therefore, be strictly construed. (*Sharp v. Speir*, 4 Hill, 76. *Sharp v. Johnson*, Id. 92.) 4. The property owner is entitled to demand that the very improvement which the proper representatives of the municipality have determined to be necessary, shall be completed before he pays his money. The common council have only authorized their officers or the officers of the city to assess him

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for a certain work, and it does not lie in the power of the assessors to create a lien on his land for another and a different work. (*Matter of Mott, MS.; and cases cited in Judge Brady's opinion.*)

II. It cannot be said that as the ordinance provides that the street shall be paved, and that crosswalks be laid and relaid at the intersecting streets, under such directions as shall be given by the Croton Aqueduct department, therefore such department may authorize the contractors who do the work to omit the crosswalks at an intersecting street. In point of fact, the contractors did not follow the instructions of the department, as they laid neither parallel nor transverse crosswalks at those intersections. 1. Such a construction would be a manifest perversion of the language of the ordinance, because the words "under such directions," &c., apply as well to the pavement as to the crosswalks. And if they can be said to mean that the Croton Aqueduct department may permit the omission of a crosswalk, they may, with equal truth, be said to mean that said department can direct that a certain part of the street shall not be paved. If the words mean that the discretion given to the department is to be so exercised as to control the direction of the common council, then it necessarily follows that upon the department devolves the right to say whether a block, or two blocks, or the whole street shall remain unpaved. 2. But it is unnecessary to give to the words of the ordinance any construction so forced or violent. The true meaning of the language of the ordinance is, that the work directed by the common council shall be executed under the supervision of the Croton Aqueduct department, i. e., the department is to ascertain whether the work is done according to the directions given in the resolution or ordinance, and the members of the department are to direct those performing the work to that end and for that purpose. 3. In the case of *Wood*, above referred to, it was sought to justify the substitution

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of the Belgian pavement for the gutter stones, on the ground that the water purveyor, representing the department, had assented to the change, but the court held that he had no authority to give such assent, so as to bind those whose property was to be assessed to defray the expense of the improvement. (*Matter of Wood*, 51 Barb. 276.)

III. The order below should also be affirmed for the reasons stated in the following points: 1. The allowance to the contractor of three and a half dollars per day for each day that the work was completed prior to the time specified in the contract, was clearly irregular and illegal. The evidence shows that at the time these contracts were advertised and entered into, there were no parties in the city of New York, other than the Nicolson Pavement Company, who were authorized to lay such pavement. The company claim that there are are other wooden pavements which are infringements of their patents, but there are and were no other parties who claimed the right to lay Nicolson pavement, as such. The advertisement called for Nicolson pavement, and that company was the only bidder. Now, even if it be conceded that where a work is, or can be, a matter of competition, the element of time can be properly taken into estimation in determining who is the lowest bidder, it is clear that in the case of a patented article, for which alone the bids are to be received, and where such bids can come from only one party, no allowance for doing the work within the time required by the contract is proper. The company name their time in their bid, and the allowance to them of compensation for doing the work within that time is no legitimate part of the expense of the work. 2. Again; the act of 1813, section 175, under which the mayor, aldermen and commonalty are authorized to make assessments for these local improvements, only permits an assessment to be made for the expense of conforming to the regulations specified in the section. (*Davies' Laws*, p. 526.) Now,

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the allowance in question is a mere gratuity, and is no part of the expense of conforming to the regulation of the mayor, &c., of New York. 3. It seems to us that a moment's reflection will show that this point is well taken. If the contractor who has no competitor can be allowed compensation for ten days, within which he may perform his work inside of the contract time, he can be allowed for five hundred days, and he is thus placed in a position which puts the city authorities, and those who are assessed, at his mercy. 4. The abuses to which an allowance of extra compensation for performing the work within the time specified in the contract may lead, can at once be seen by referring to the proofs in these cases. The contract time on Irving place was 150 days. Work was completed in 126 days, and the contractor was allowed compensation at the rate of \$3.50 per day for the remaining 24 days. On Nineteenth street the contract time was 200 days. It was completed in 119 days. The extra allowance was for 81 days, at same rate. On Sixteenth street, contract time was 120 days. Work was completed in 72 days. The extra allowance was for 48 days. 5. The principles laid down by Judge Brown, in the case of the *People v. Village of Yonkers*, (39 Barb. 266,) are applicable to this case. In that case, where the estimates of the expenses of a local improvement inserted in an assessment list were specifically enumerated, there was a charge of \$460.05 for "contingencies." It was held that the insertion of this item rendered the whole assessment illegal and void.

IV. The whole proceedings to impose an assessment in these cases are illegal and void, for the reason that there was no advertisement for proposals, nor letting of the contracts, in conformity with the provisions of the 38th section of the charter. 1. As we have before seen, the Nicolson pavement is a patented article, and no person or company, other than the Nicolson Pavement Company,

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had authority to lay such pavement in the city of New York, at the time these contracts were let. Now, as the resolutions and ordinances called only for the Nicolson pavement, it is quite apparent that there could be no competitive bidding, and that if the work was done by any one, it must fall to the Nicolson Pavement Company. The evidence in the cases, therefore, showing an advertisement for proposals and bids, and that one bid was received from the company, and the contract awarded to them, does not show a compliance with the spirit and intent of the language of the charter. (*Charter*, § 38.)

V. The point last taken is not really affected by the decision of this court, at general term, in the case of *Astor v. The Mayor &c.* (not reported.) 1. The opinion of Judge INGRAHAM, in that case, was delivered upon an application for an injunction to restrain the making of contracts for the pavement. At that time no work had been done, and no assessment had been laid, nor was it at all certain that any assessment would ever be laid upon the property owners whose lands were supposed to be benefited by the improvement. The real point of that decision was, that the city was not to be excluded from using a patented article because there could be no competitive bidding for the work of furnishing such article. It may well be that the city could use a patented article, and pay the cost thereof out of its own treasury, but we insist that when it is proposed to defray the expense of a local improvement by an assessment upon the adjoining property, the owners of such property are entitled to have the work let in the manner provided by the charter. The reasoning of the court in the case of *Dean v. Charlton*, (7 *Am. Law Reg.* 564,) we submit, is conclusive as to this point.

VI. Assuming, however, that it is within the power of the municipal authorities to use any pavement which, being a patented article, cannot be the subject of competitive bidding, and also assuming that the 38th section of

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the charter does not apply in such cases, the assessments in question are void, for the reason that the work of laying down the crosswalks or bridge stones is properly a subject of competition, and that such work was not let in the manner provided by the charter. 1. It appears, from the advertisement produced in evidence, that the proposals only called for Nicolson pavement. It also appears, from the testimony of Dodge, the contract clerk in the Croton Aqueduct department, that "there would have been no difficulty in advertising for the bridge stones separately." It also appears from the evidence, that in each of the streets in question, the cost of laying such crosswalks and bridge stones as were laid, exceeded the sum of \$250. There were 772 square feet laid in Nineteenth street, at \$1.30 per square foot, making \$1003.60. There were 259 square feet laid in Irving place, at \$1.30 per square foot, making \$336.70. There were 616 square feet laid in Sixteenth street, at \$1.30 per square foot, making \$800.80.

2. It cannot be said that because the resolutions and ordinances were passed by a three-fourths vote of the common council, the necessity of a contract was dispensed with, because the resolutions and ordinances do not direct that the work shall be done without a contract. The charter provides that all work involving an expenditure of more than \$250 shall be by contract, &c., unless by a vote of three fourths of the members elected to each board it shall be otherwise ordered. (§ 38.) The mere fact that a resolution or ordinance directing work to be done, but silent upon the point whether there shall be a contract or not for such work, receives a vote of three fourths of the members elected to each board, does not dispense with the necessity of a contract. The common council must declare, upon the face of the resolution or ordinance, that they desire to have the work done in a different manner from that prescribed by the charter, as the general rule—to wit, without a contract. Any other construction is in

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conflict with the plain terms of the charter, and will authorize the executive departments to dispense with the formality of a contract let as required by the charter, where there is not the slightest intimation on the part of the common council that they intend to waive such formality, or to depart from the provisions of the charter.

VII. We are well aware that in some cases it has been held that the objections taken in the fifth and sixth points cannot be raised in proceedings instituted under the act "in relation to frauds in assessments for local improvements in the city of New York." (*Laws of 1858, p. 574. Miller's case, 12 Abbott, 121.*) Those cases were decided at special term in 1861, before the act in question had been the subject of much judicial examination, and the point has never, so far as we know, been passed upon by the general term. Since then the courts have been disposed to adopt a much more liberal rule in applying the statute, and we submit with confidence, that an omission to contract for work, as required by the charter, is now to be considered as a good ground for relief under the statute. The act is a remedial statute, and should be liberally construed. (*Matter of Eightieth street, 17 Abb. 325. Mott's case, MS.*)

VIII. The evidence shows that in making the assessments in question, the assessors did not follow the provisions of the act of 1813, section 175. That section provides "that it shall be lawful for the mayor, aldermen and commonalty to cause common sewers &c. to be made &c., and to order and direct the pitching and paving the streets thereof, &c., and to cause estimates of the expense of conforming to such regulations to be made, and a just and equitable assessment thereof among the owners or occupants of all the houses and lots intended to be benefited thereby, in proportion, as nearly as may be, to the advantage which each shall be deemed to acquire." 1. The evidence of Mr. Robert J. Dillon shows that the assessors

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did not, in determining the amount to be assessed on each lot, govern themselves by the benefit which such lot derived from the improvement, nor did they ascertain what property was actually benefited. Mr. Dillon testifies that, in an interview he had with the assessors, "I asked Mr. Tweed, and also Mr. Hart, whether they thought that my property was benefited to the amount of the assessment, and they said 'No.' Mr. Tweed then said, in substance, that they made their assessment without reference to the question of benefit. That they ascertained the amount of the contract, and the lineal feet on either side of the improvement, and divided it, or something nearly to that effect. I asked him if he had read the act of the legislature authorizing the common council to make improvements, and the ordinance of the common council ordering the improvement to be made, and the terms of the oath taken by the assessors, which I told him, in my opinion, required the assessment to be made according to benefit. He said he did not look at it in that light, or something to that effect." The testimony of Hart, one of the assessors, is to the same effect. Q. "Your general rule is to take the frontage of each lot and assess on that lot the proportion of the expense which that frontage bears to the whole line of the work. I mean by this, that if the whole line of the improvement is 2500 feet, and the lot is 25 feet, and of the usual depth, you would assess it for one hundredth part of the expense?" A. "Yes, sir." Q. "Suppose a lot is 80 feet in depth and 25 feet in width on the improvement, do you not assess it for the same amount as a lot of the same width would be which is 100 feet in depth?" A. "Yes, and even if it is 50 feet in depth." Q. "When do you vary the assessment on lots of equal width but of unequal depth, and upon what principle?" A. "If we have a lot 25 feet front, 100 feet deep, and 50 feet wide in the rear, we assess it the same as we do a lot 25 by 100 feet."

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It is quite apparent that no effort was made by the assessors, therefore, to ascertain what property was benefited by the alleged improvements. They arbitrarily assumed that they could not go beyond property which was half the distance to the next street or avenue as their area of assessment, or assessment district; and then having ascertained the number of lineal feet on the line of the improvement, they assessed each lot for that proportion of the whole expense which the frontage of said lot bore to the whole number of lineal feet on the street. We respectfully submit that the principles advanced by the Supreme Court, in *Le Roy v. The Mayor &c. of New York*, (20 John. 429,) control this branch of the case, and that, under the authority of that case, the assessments in question are erroneous in principle. (*See also Bouton v. Brooklyn*, 2 Wend. 395.) We presume that the assessors have been led into this error by supposing that their powers were limited in assessing for a local improvement, in the same manner as commissioners are limited in assessing for a benefit for opening a street. But they are not so limited. The commissioners are restricted by the statute in assessing for benefit for opening streets, to property fronting on the line of the improvement, "or being at or within half the distance of the next street or avenue, &c., on each side thereof, and which the said commissioners may deem benefited," &c. (*Act of 1813*, § 177, *Davies*, p. 530.) But the assessors are "to make a just and equitable assessment &c. among the owners &c. of all the houses and lots intended to be benefited thereby, in proportion, as nearly as may be, to the advantage which each shall be deemed to acquire." (*Davies*, 526, § 175.)

IX. The assessments are also erroneous in principle, for the reason that the corner lots, affected by the same, are assessed as if they were three or four full lots on the side street, and as one full lot on the street or avenue on which they front.

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Mr. Tully says that "the rule for corner lots is to assess three quarters of the depth, but the lot has to pay its proportion of the intersection besides. I mean by this, that a corner lot, running parallel with the line of the work is assessed for three quarters of its depth. A corner lot fronting on the work is assessed for its frontage, and also for intersections. For intersections we charge the full depth of the lot." Q. "Then the result is that a corner lot of twenty-five feet by one hundred, running parallel in its depth with the line of the work, is assessed three times as much for the improvement as a lot twenty-five by a hundred feet which fronts at right angles to the street?" A. "Yes." This evidence was objected to, and taken, subject to objection of the corporation counsel, but we submit it was proper. The practical injustice of this rule can be seen by looking at a few of the cases. Mrs. Allen's corner lot is assessed for Irving place, \$297.93; the same lot is assessed for Sixteenth street, \$708.60, amounting to \$1006.53. Her lot is twenty feet one inch on Irving place, and eighty-six feet four inches on Sixteenth street. The lot adjoining, on Sixteenth street, is twenty-two feet wide, and ninety-two feet deep, and, of course, contains more square feet than hers. It is assessed, for Sixteenth street, \$229.74. Her lot, for the purposes of the Irving place assessment, is therefore regarded as a full lot on that street, and for the purposes of the Sixteenth street assessment, it is regarded as over three full lots on Sixteenth street. With less superficial area than the adjoining lot on Sixteenth street, she is called upon to pay more than three times as much as the adjoining lot. She pays for Sixteenth street, \$708.60. The adjoining lot pays \$229.74. Mr. Dillon has a corner lot twenty-six feet on Fourth avenue, and 125 feet on Sixteenth street. He is assessed \$1066.14, or for one hundred and fifty-one feet, or four or five lots, as he testifies. We have seen that a lot next to Mrs. Allen's, on Sixteenth street, being twenty-two feet wide by ninety-two

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feet deep, is assessed only 229.74. Dillon's lot contains about 1200 more superficial feet than this lot, but he is assessed more than if he owned four lots of the dimensions of twenty-two by ninety-two feet. The same facts appear in the case of Hearn and Eager. Mrs. Eager's assessment for 2643 square feet is as follows: For Irving place, \$365.68; Nineteenth street, \$844, amounting to \$1209.68. The assessment lists can, by stipulation, be referred to by either party, and can be produced for the inspection of the court, if it is deemed necessary.

X. There is an irregularity in each of the assessment lists in the matter of the fees for collection. 1. The ordinance only authorizes the collector and deputy collectors to receive an equal part of two and one half per cent "on all items of assessments collected by the bureau during their term of office, and of two per cent on all unpaid items of assessments returned during their term of office to the bureau of arrears." Even if it be conceded that such a charge can properly be included in the assessment list as a part of the expense of the work, the charges actually included in these lists exceed the per centage allowed by the ordinance. The ordinance clearly does not contemplate that the collector and his deputies, after having ascertained the sum which would amount to two and a half per cent on the items in the list, shall add that amount into the assessment, and then calculate a percentage on it also. Now, by the testimony of Tully, it appears that the total items of the Nineteenth street assessment, exclusive of the collector's fees, amount to \$48,695.40, and that two and a half per cent on that sum is \$1217.38. Yet the charge for collection is \$1248.60. That the total amount of the items in Irving place, excluding collector's fees, is \$26,042.80. Two and a half per cent, is \$651.07. The charge for collection is \$667.76. That the total amount of the items in Sixteenth street list, excluding the collector's fees, is \$23,926.10. Two and a half per cent, is

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\$598.15. Yet the charge for collection is \$613.48. 2. Even if the two and a half per cent is calculated as the fees of the collector, and added to the two and a half per cent of the other items, the court will see by a calculation, that the gross percentage will not reach the amount included in each list.

XI. For the reasons above stated, the order below should be affirmed.

By the Court, INGRAHAM, P. J. We have heretofore held that the act of 1870 did not apply to cases which had arisen before the passage of the act, but that such act was prospective only, in requiring the amount erroneously assessed to be deducted.

There can be no doubt of its having been irregular not to lay the crosswalks as directed by the ordinance, and yet to charge upon the owners of lots the cost of laying them. The cost of laying Nicolson pavement was \$4.95 per square yard; the cost of the bridge stones was \$1.30 per foot—nearly three times more than the wooden pavement. It would not require any great stretch of the imagination to find that such a charge was a fraud on the lot owners, which entitles them to the relief sought.

The charge of two and one half per cent for collecting was not, in my judgment, erroneous. The statute gives that amount on moneys collected. This charge, as well as the cost of the work, has to be raised by an assessment on the property, and the whole sum when collected is paid into the treasury. The statutes evidently give the percentage on the whole amount-assessed and collected.

It may well be doubted whether the contract was properly made to include an allowance to contractors for extra compensation, if the work is done before the time fixed in the contract. No such authority is given by the statute authorizing the assessment, nor does the ordinance directing the improvement provide for it. We see no author-

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ity for the department to agree to pay extra sums to the contractor, not for doing the work, but for doing it quicker than he would otherwise do it. It is opening a door for abuses which, by extending the time for completing the work, may give to a contractor large sums of money for which he would render no equivalent.

Order appealed from affirmed.

[FIRST DEPARTMENT, GENERAL TERM, at New York, January 8, 1871.
Ingraham, P. J., and Cardozo and Geo. G. Barnard, Justices.]

GEORGE S. THOMPSON *vs.* JAMES C. FARGO, treasurer, &c.
 of the American Express Company.

The plaintiff, acting under a power of attorney from W., received from the United States government money due from the latter to W., and thus became the debtor to W. for the amount. W. directed the plaintiff to send the money, when collected, less charges, to W. care of M., at Terre Haute. No particular method of conveyance being designated, the plaintiff delivered a package containing the amount, in treasury notes, directed to W. care of M. at Terre Haute, to the U. S. Express Company, to be transported. Such package was carried, by that company, to the termination of its route, and there delivered to the defendant to be carried to Terre Haute. It was so carried, but after diligent search, neither M. the consignee, nor W. could be found, and the package was retained by the defendant.

Held that as W. had no claim to any particular money, when the plaintiff delivered the treasury notes to the U. S. Express Company, he simply delivered his own property to be forwarded, to discharge his indebtedness to W. And that both the plaintiff and W. had such a title to the property that an action might be maintained by either of them; and a recovery by either would bar an action by the other.

A PPEAL from a judgment entered upon the report of a referee.

The action was brought to recover a package of money delivered to the defendants to be transported by them. The facts were these. The plaintiff, on the 11th day of August, 1865, at Springfield, Ill., delivered to the U. S.

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Express Company a package containing U. S. compound interest notes and greenbacks amounting to \$660.63, directed to John and William White, care of James K. Martin, Bunton House, Terre Haute, Indiana, to be on the delivery of the package to Martin, brought by him to said J. and W. White. The package was carried by the U. S. Express Company to Decatur, Indiana, the terminus of their route, and there delivered to the defendant who carried it to Terre Haute, Indiana. James K. Martin, the consignee at Terre Haute, was not at the Bunton House, nor could he, after diligent search, be found, nor the said John or William White. The package was therefore forwarded to New York city, the principal office of the defendant, in September, 1868. The plaintiff, thereupon, at the city of New York, demanded of the defendant the package, and offered to pay all costs and charges, and indemnify the defendant against the claim of the consignees. The defendant refused to deliver the package, and thereupon this action was brought. The case was referred to John Sherwood, Esq., who found the following facts:

1st. That the defendant, the American Express Company, is a joint stock company consisting of more than seven members, and is engaged in the express business as common carriers, whose principal office is in the city of New York.

2d. That on or about the 11th day of August, 1865, the said American Express Company received from the U. S. Express Company, at Decatur, in the State of Indiana, a package, containing U. S. compound interest notes and 7 3-10 treasury notes, to the amount of \$660.63, together with the papers discharging John and William White from service in the army of the United States, being the package described in the complaint, and gave a receipt to the U. S. Express Company therefor. That said package was addressed as follows: "By the United States Express Company, \$660.63, John and William White, care of

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Capt. James K. Martin, Bunton House, Terre Haute, Indiana."

3d. That the American Express Company conveyed the package in question to the place of destination without delay. That diligent search and inquiry was made for the consignees, but that they could not be found or heard from, nor could any such person as James K. Martin, to the care of whom the package was directed, be found. That the defendants immediately advertised in the newspapers at Terre Haute, that they had received and held the package in question for them the said John and William White.

4th. That the contents of the package in question was the net proceeds of the back pay of the said John and William White, as soldiers in the army of the United States, and their discharge papers from the service, and a letter from the plaintiff. That John and William White had employed the plaintiff as their agent to collect for them the money in question from the United States government. That for this purpose they inclosed to him a power of attorney, and wrote him a letter, which power of attorney and letter were in evidence, and at the same time sent to the plaintiff their discharge papers. That the money in question contained in the package, was the proceeds of a check received by the plaintiff from the government agent at Springfield, Illinois, for the back pay of the said John and William White. That before inclosing the same in the wrapper, the plaintiff had deducted from the amount received by him, the amount he claimed as his charges against the Whites for his services in collecting the money.

5th. That the package in question, directed as aforesaid, had been delivered to the U. S. Express Company, at Springfield, in the State of Illinois, by the plaintiff, on the 11th day of August, 1865, for conveyance and delivery according to the directions of the said package, and a

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receipt therefor had been by him taken from that company, which said receipt the plaintiff retained, and has since lost.

6th. That the plaintiff demanded the package in question from James C. Fargo, the treasurer of the defendant, at the city of New York, before the commencement of this action, who refused to deliver the same to him; and that at the time of such demand the said package was at the city of New York in the charge of the American Express Company, and that the plaintiff also offered to pay the defendant all costs and charges, and give him a bond of indemnity.

The referee found, as a conclusion of law, that the plaintiff was entitled to judgment against the defendant for the delivery to him by the defendant of the package described in the complaint, and \$156 damages for the detention thereof, and that the value of said package was \$816.93.

By the judgment entered upon this report, it was adjudged that the plaintiff recover of the defendant the package and personal property described in the complaint, together with \$156 damages for the detention thereof, and the sum of \$209.19, his costs and disbursements incurred in this action.

And it was further adjudged, that in the event that said package could not be delivered to the plaintiff, he recover of the defendant the sum of \$816.93, the value thereof, and said costs and disbursements; and said damages of \$156; in all amounting to \$1182.12.

E. Van Ness, for the appellant.

I. The rule of law applicable to the facts in this case is stated by *Angell on Carriers*, (§ 502,) as follows: "If, after the carrier has performed his part of the contract, by conveying the goods to the place to which they are directed, it should appear that there is no such person as the one to whom the goods are addressed, then a new contract arises

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by implication of law, between the carrier and the consignor; the carrier holds the goods as the bailor of the consignor, and is bound to take due care of them and to deliver them to the consignor on being paid his fair and reasonable charges." (*See also Chitty on Carriers*, p. 89.) No case can be found holding a different rule on this state of facts. The referee says he found this case "one of extreme difficulty." The points raised by the defendant below were as follows: 1. "That there is no privity between the plaintiff and the defendant because the defendant received the package of the U. S. Express Company, and gave them a receipt for it." Now it does not appear what kind of a receipt they gave the U. S. Express Company, nor is it material. The directions on the package showed who was the consignor, and to whom the package was directed, and was notice to them that the U. S. Express Company had no interest in the package. The U. S. Express Company only agreed with the plaintiff to forward to the nearest point of destination reached by this company, and they did forward it to Decatur, Indiana, the terminus of their route. The defendant put in evidence a letter from the plaintiff to the defendant, in which the package is described as having been delivered by the plaintiff "to your agent at Springfield;" so that the defendants are the plaintiff's principals in the transaction, and the privity between them is direct. This letter covers the plaintiff's case, and as it is put in evidence by the defendant, is conclusive. "The said package not having been delivered, and the same being the property of the undersigned, you are hereby notified to deliver the same to the consignees thereof." The U. S. Express Company have now no interest, and have made no claim on the defendant. 2. The defendant contended that "the consignee is the owner of the goods, and the defendant is responsible to him alone, for the reason that he is the owner." What the rights of the plaintiff may be in this action, do not depend upon

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the question whether he would have a right of action for damages for the malfeasance or misfeasance of the carrier; and all the cases cited by the defendant were of that nature. The action against the carrier, for damages, is founded upon the contract, and not on property. (*Angell*, p. 504. *Edwards on Bailm.* 539. *Hawkins v. Hoffman*, 6 *Hill*, 586.) Trover has been maintained by persons having no pretense of title, as by a traveler, for a carpet-bag intrusted to him by a friend. (*Morand v. Portland*, 35 *Maine*, 55. *Kellogg v. Sewell*, 1 *Lansing*, 397.) By a laundress, for linen sent to her employer, and lost by the carrier. (*Freeman v. Birch*, 1 *Nev. & Man.* 420. *Joseph v. Knox*, 3 *Camp.* 320.) *Ellenborough J.* "To the plaintiff, from whom the consideration moved, and to whom the promise is made, the defendant is liable for the non-delivery of the goods. The plaintiff will hold the sum received as a trustee for the real owner." In such cases the court hold that the plaintiff has a beneficial interest in the performance of the contract.

In this case the consignee was James K. Martin; the package was directed to him, and to him it was to be delivered by the defendant. It is manifest that he had no interest in the package. The letter of instructions of John White to the plaintiff, was: "I want you to get our money as soon as possible, and send to Capt. James K. Martin, Bunton House, Terre Haute, Indiana, and he will fetch it to us." As between the consignor and consignee, if the question of title can be raised, who has the better right? Capt. Martin refuses to take the package, but the defendants say he must or he may take, and therefore they can keep it for themselves. The defendants are not liable to the Whites; they have discharged their whole duty to the Whites; nor is there any privity between the defendants and the Whites; the plaintiff retained the bill of lading, the evidence of title. (*Joseph v. Knox*, 3 *Camp.* 320.) 3. That if goods are ordered to be

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sent by a carrier, though no particular carrier is named, "the moment the goods are delivered to the carrier, it operates as a delivery to the consignee, and the whole property vests in him." As between vendor and purchaser, title passes, but this does not concern the carrier when the consignee refuses to take the goods. When a defendant sets up the title of a third person, he must show some claim, title, or interest in himself derived from such third person. The consignor is entitled to a return, and holds the goods for his own indemnity, and as trustee for the consignee; or the carrier may put the goods in store and discharge his liability, and sue the consignor for the freight. When the consignee refuses the goods, denies the privity, repudiates the carriage, the ordinary principles of estoppel, as between bailor and bailee, apply; and upon being sued by the consignor, he cannot set up the title of a third person. The duty and responsibility of the defendant as carrier has ended, and he is now nothing more than an intruder between the parties between whom the confidence and trust reposes. To allow a depositary to set up the title of another who makes no claim, would enable a depositary to keep for himself that which he does not claim any title to, whatever. The package was delivered upon a special trust, to wit, to deliver to the consignee; the trust fails, the package necessarily reverts to the plaintiff. The simple consignment of goods, unexplained, merely shows that the consignee is the authorized person to receive the goods. (*Conard v. Atlantic Ins. Co.*, 1 *Peters*, 444.)

II. When the consignee does not name the carrier, or when the consignee is not bound to receive the goods, the right of action for a loss is with the consignor. In this case the Whites did not name the carrier, (only one of them wrote;) nor were they bound to receive the package; the account between the parties is unadjusted. Besides this, the contract to carry was made by the plaintiff

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in his own behalf, and he took the bill of lading and retained it. The defendants undertook to carry for the plaintiff. (*Angell on Carriers*, §§ 498 to 503.)

III. Money collected by an agent belongs to him; charged with a trust on behalf of his principal. (*Chapman v. White*, 6 N. Y. 412. *Dunlap Paley Agency*, p. 90, and notes.) The delivery of the package to the defendant was an attempt to discharge that trust, but failed. The Whites employed the plaintiff and confided in him, and he is responsible to them. (*Dunlap*, p. 363.) It is not for the defendant to thrust itself between the parties and constitute itself a trustee, and leave the plaintiff to the risk of an action by the Whites. The plaintiff has a right to revoke the contract and demand back the package.

IV. After the carriage of the goods is ended, it is immaterial who brings the action, a recovery by one is a bar to the other, and if both bring an action the defendant may interplead. (*Smith v. James*, 7 Cowen, 328. *Green v. Clarke*, 12 N. Y. 351, 384.)

V. Irrespective of any other consideration, and on the supposition that the consignee is the owner, and that the contract was made for him, the plaintiff can maintain the action, under section 113 of the Code, as the trustee of an express trust, who is defined to be one with whom, or in whose name, a contract is made for the benefit of another. (*Considerant v. Brisbane*, 22 N. Y. 389. *Grinnell v. Smith*, 2 Sandf. 706. *Minturn v. Main*, 7 N. Y. 224. *Bogart v. O'Regan*, 1 E. D. Smith, 590. *Story on Agency*, §§ 112, 161, 162, 393.)

Hooper C. Van Vorst, for the respondent.

I. The plaintiff has no property, general or special, in the package in question, and has no status to maintain this action for a claim and delivery of the same. The money in the package and the "discharge papers" belonged to the Whites, discharged soldiers from the United States

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army. The plaintiff has no title, as owner, to the contents of the package, and no claim or lien thereon of any name or nature. The allegation in the complaint that the package is the property of the plaintiff is untrue. The plaintiff never had any title to the same. The discharge papers belonged to the Whites, as their evidence of release from the service of the United States. The money was received as their back pay, in pursuance of their instructions to the plaintiff. The plaintiff has no lien on the package in question. His charges for his services in the matter were all deducted before he delivered the package to the United States Express Company.

II. The only duty the plaintiff had to perform in the matter was to collect the money and forward it with the "discharge papers" to the Whites. The plaintiff having been paid his commissions for that service, has no lien on, or property in, this money or the "discharge papers," and could have no right again to take the property into his possession, and subject it to further charges, or to mingle it with his own property, and thus put it in jeopardy. The intrusion of this plaintiff, after having forwarded the money and discharge papers, as directed, to the owners, is well calculated to raise the presumption that his motive is not beneficial to the Whites, but to himself; especially as it appears that the property is in the hands of a solvent party ready and able to respond. The money was safe in the hands of a responsible party as bailees for the Whites. It was where the law properly consigns it, under the facts. The plaintiff seeks to impose upon this fund the expenses of a suit, and probably to confiscate the remainder to himself. He is moved by no duty to the consignees; nor is retained by them to bring this suit. He moves in opposition to their interests, claiming himself as owner.

III. The defendant having received the package in question from the United States Express Company, and having given a receipt to that company therefor, and having made

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an engagement in respect thereto with it, is answerable only to the actual owner of the property, or to that company, for the package, or its duty in the premises. The receipt which the United States Express company holds, contains the terms of the engagement of the defendant with respect to the subject matter. Upon that engagement, this defendant is liable to the United States Express Company. The plaintiff has not been subrogated to the rights and remedies of that company; nor does he sue in its interest or that of the Whites. He is proceeding for himself. There is no privity between the plaintiff and the defendant. Should the plaintiff succeed in this action, it leaves still outstanding the contract between this defendant and the United States Express Company, and upon which this defendant is liable to that company, and also to the claim of the Whites.

IV. The defendant is a common carrier, and received the package in question in the line of its duty as such. A common carrier, being engaged in a public employment, is subject to peculiar duties and great responsibilities. In the way of his business, the carrier is obliged to recognize, and is governed by, certain well established and clearly recognized rules and presumptions, chief amongst which, and fundamental, is the presumption that the consignee is the owner of the goods. That the consignee is the presumptive owner, and that the carrier must look to the consignee for instructions as to the delivery of the article carried, has been decided in all the cases brought before this court. (*Ang. on Car.* § 497. *Everett v. Salties*, 15 *Wend.* 475.) The consignee of the property is, in law, presumed to be the owner. (*Fitzhugh v. Wiman*, 5 *Seld.* 562. *Sweet v. Barney*, 23 *N. Y.* 335. *Platt v. Wells*, 2 *Robertson*, 101.) When the package reaches the carrier, he is to look to the consignee only. If the package had been lost in its transit to *Terre Haute*, the plaintiff would not have entertained any idea of suing

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for it. Nor could he have maintained an action for the loss. The consignee is the party to sue. The carrier must be liable to one party or the other. It is illogical to suppose that two persons claiming separately to be the owners could each maintain successfully an action for the same property. When goods are delivered to a carrier on behalf of the consignee, and are placed at his disposal, the property in the goods becomes immediately vested in him, and he, and not the consignor, is to maintain an action for the same against the carrier in cases of loss or conversion, or refusal to deliver. (*Ang. on Carriers*, § 497. *Arbuckle v. Thompson*, 37 Penn. 170.) If a tradesman order goods to be sent by a carrier, though he does name any particular one, the moment the goods are delivered to the carrier it operates as a delivery to the purchaser; the whole property immediately vests in him; he alone can bring any action for the goods. The only exception is the traders' right of stoppage in transitu. (*Dutton v. Solomonson*, 3 B. & P. 584. *Dawes v. Peck*, 8 Durn & E. 330. *Madison v. Whitel*, 11 Ind. 55.)

V. But in this case the legal presumption, arising from the consignment, that the consignee is the owner, is in accord with the real facts. For the Whites, the consignees, were the actual owners of the package in question, and of its contents—the money and their discharge papers—and to whom the defendant is responsible for the package in question. Had the Whites died, even during the period the property was in transit, or afterward, the plaintiff is remitted to no claim or right to the property; it belongs to the legatees or legal representatives of the deceased, who alone, under such latter facts, would be entitled to receive or sue for it.

VI. Where the goods have been taken to the place of destination, and the consignee is absent, or on inquiry cannot be found, the duty of the carrier is not to return the goods to the consignor; nor is the carrier absolved from

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all responsibility; he is still bound to make efforts to place them in the hands of the consignee, and when these efforts are ineffectual, to take care of the property for the owner, by holding them himself, or by lodging them with some suitable and responsible person for him, and then such person becomes bailee for the owner of the goods. (*Ostrander v. Brown*, 15 *John*. 39. *Fisk v. Newton*, 1 *Denio*, 45. *Stone v. Waitt*, 31 *Maine*, 409. 2 *Redfield*, "Common Carriers," ch. 26, § 175, pp. 16, 18. *Ang. on Car. to same effect*, § 291.)

If the consignee cannot be found, the carrier is not legally bound to notify the consignor of that fact; his legal duty is to take care of them until they are placed in the hands of the true owner. (*Williams v. Holland*, 22 *How. Pr.* 137. *Hudson v. Bazendale*, 2 *Hurl. & Norm. Exch.* 575.) In *Hamilton v. Nickerson*, (11 *Allen*, 308,) it was held that when a carrier has obtained the custody of goods he may retain the same until he can deliver them to the consignee or owner, if he choose to do so; or he may, if the owner cannot be found, store them either for himself or the owner. And when the goods are so stored, they belong to the consignee and owner; and under such circumstances, after being once stored, the carrier could never make any claim again to them, should no owner appear.

VII. The referee erred in deciding that if the consignee could not be found, a new contract arose to return the property to the consignor. It is submitted that no case can be found to justify any such rule. But that the same is in opposition to the whole current of authority on the subject. The referee expresses himself with hesitation, and acknowledges his doubt about the correctness of his own decision. And he may well do so. The "single authority," by which the referee confesses his proposition to be supported, is *Angell on Carriers*. (See *Angell on Carriers*, § 502.) But on an examination it will be found that this author founds his doctrine of an "implied contract" to

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return to the consignor, upon the sole fact that "it should appear that there is no such person as the one to whom the goods are addressed." Such fact does not appear in this case, but on the other hand, it clearly appears that there were such persons as the Whites. The only relation the plaintiff had to the package was through them. But *Angell*, to support the dictum on that subject contained in his work, refers to the case of *Stephenson v. Hart*, (1 *M. & Payne*, 357.) The case cited does not support *Angell*. In the case referred to, the vendor of goods had been induced by the false representations of one West, a felon, to part with the possession of his merchandise. He was deceived by the felon into delivering the goods to a carrier, directed to the felon, at Great Winchester street, London. The goods were taken by the carrier to this place, but no such person as West could be found. The carrier then held the goods for a week, and then sent them to St. Albans, and delivered them to a person by the name of West, there. The consignor in that case was allowed to recover of the carrier the value of the goods. But the grounds upon which the decision in that case rested, were, that the consignor was the owner of the goods; that he did not part with the ownership. That the consignee or a felon gained no title by the delivery to the carrier, as the same was procured by false representations, amounting to felony. And that the delivery to the consignee, at St. Albans, was not a good delivery. But none of the elements exist in the case at bar. Here the plaintiff never was, and is not, the owner of the property in question, but the consignees are. And it was forwarded to them by their directions, and they only are entitled to the same. In this case, there are in existence no elements out of which could be constructed a new contract to return the goods to the consignor. The carrier never so agreed. And there is nothing out of which any such undertaking could be implied. The element of owner-

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ship in the chattel in the consignor, and of any knowledge of such ownership in him, on the part of the carrier, is wanting; therefore, no such implied contract can arise. In fact no "implied contract" can ever arise, except there be facts in existence to justify it, and sufficient to impose upon a party such an obligation. If a carrier is not obliged to notify a consignor that the consignee cannot be found, he is not certainly obliged to return the article to him.

VIII. The plaintiff has no interest in the cause of action, and therefore cannot maintain this suit. Every action must be brought in the name of the real party in interest. (*Code*, § 3.) In order to sustain a suit against a carrier for damages to, or loss of, goods, it must appear that the goods belonged to the plaintiff at the time of the injury. (*Law v. Hatcher*, 4 *Black*, 364.) It is quite clear that this plaintiff could not maintain such an action, in case the package had been burned or destroyed. It must have been brought in the name of the owners. The plaintiff's consignment to the Whites puts it out of his power to act further, in the premises. (*Dows v. Green*, 16 *Barb.* 72. *Smith's Mercantile Law*, 366, 3d ed. *Freeman v. Birch*, 1 *Nev. & Man.* 420.) In this last case, cited by the plaintiff, the party sending a "laundress" had a "special property in the goods;" upon that ground only was she allowed to sue. In *Swain v. Shepperd*, (1 *Mood. & R.* 224,) also cited by the plaintiff, it was held that the goods, the subject of the action, being sent by a merchant "only for approval," no title passed until the consignee had received and adopted the goods. That, we do not dispute. In addition, this is substantially an action of replevin, the delivery to the plaintiff of the property in question, being, as is alleged in the complaint, a "certain package of money." Such an action can only be maintained by a person who has a general or special property in the property. (*Code*, § 207.) This plaintiff has no "spe-

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cial" or "general property." The attempt to make the plaintiff a trustee of an express trust is absurd, and exhibits the weakness of the plaintiff's position. The relation of the plaintiff to the money is ended; he collected it for the Whites, and forwarded it to them as they directed; that ends his business. The express company is the depository or trustee for the Whites. They hold the package for them, and have publicly advertised that they so hold it, and are liable to them only. This claim of the plaintiff to act for the Whites is an after-thought. He claims to sue as the owner of the package; he is now prosecuting for this money to appropriate it to his own use, in fraud of the rights of the Whites—the true owners. And if he succeeds in this action, it will be a success in the interest of what is wrong. In his letter to the U. S. Express Company of September 19, 1867, he forbids a delivery to the Whites, and distinctly claims as owner. Would a trustee do this? This letter was written two years after the plaintiff had delivered the package for carriage, and the same being held at the time by the defendants as bailees for the Whites, and for them, and to whom they are accountable.

IX. It is clear, therefore, that the plaintiff is not entitled to recover in this action, upon any principle. That under no circumstances could the defendant be called upon to return the property in question to any other person than the Whites; and that it owes no duty to any person other than the Whites or the U. S. Express Company, and that the judgment should be reversed, and a new trial ordered.

By the Court, CARDOZO, J. The plaintiff in this action became possessed of the money by virtue of his appointment as attorney for Messrs. White, under power of attorney made by them, dated July 6, 1865. When he collected the money he became debtor to them for the

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amount. They directed him to send the amount, less his charges, to Captain Martin, at Terre Haute. No particular method of conveyance was designated. As the Whites had no claim to any particular money, when the plaintiff delivered the treasury notes to the United States Express Company, he simply delivered his own property to be forwarded to discharge his indebtedness to the Whites. Upon this statement, it is plain that both the plaintiff and the Whites had such a title to the property that an action might be maintained by either of them, and a recovery by either would bar an action by the other. (*Smith v. James*, 7 Cowen, 328. *Green v. Clarke*, 12 N. Y. 343.)

I think the judgment should be affirmed.

Judgment affirmed.

[FIRST DEPARTMENT, GENERAL TERM, at New York, February 7, 1871. Ingraham, P. J., and Cardozo and Geo. G. Barnard, Justices.]

HOLDEN and others vs. CLANCY and others.

An article designated in a contract as "slops from their distillery," does not constitute a manufactured article, within the meaning of the rule which implies a warranty of merchantable quality.

Nor is an agreement, by lessors of a cattle barn to furnish to the lessees, at said barn, slops from the distillery of the former, to a specified amount per day, during the term, an agreement to manufacture or furnish a manufactured article, in the sense of the rule referred to.

Although the residuum, or refuse, of various kinds of manufactories is more or less valuable for certain purposes, and may be the subject of sale, yet the *quality* of such refuse matter is wholly subordinate to the process which is the main object of the manufacturer; and it is not expected that his skill and attention will be devoted to it.

In the absence of any express contract, fraud or imposition, there can be no responsibility on the part of the vendor, for the quality of what is sold as slops or swill from a distillery. If the purchaser has what he bargained for, viz : slops from a distillery, the doctrine of *caveat emptor* applies.

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If there were a warranty of merchantable quality implied in such a sale, purchasers cannot recover damages on account of the inferior quality of the slops furnished, where it appears that they received and consumed the slops, from day to day, with a full knowledge of their quality, and without returning, or offering to return them, or giving the vendors notice to take them away, or not to deliver any more.

Such conduct on the part of purchasers, upon well settled principles governing executory contracts of sale, is a complete waiver of any defects in the quality of the article purchased, and brings the case within the principle of *Reed v. Ramdell*, (29 N. Y. 858.)

THIS is an appeal by the defendants from a judgment rendered against them on the report of a referee. The facts sufficiently appear in the opinion of the court.

Hunt & Green, for the appellants.

The report of the referee is founded upon an implied warranty of property delivered. It is only necessary to read the pleadings, and the findings of the referee, to reverse this judgment. He finds the contract performed on both sides, so far as delivery of the slops and payment therefor. He then finds a breach of an implied warranty, and damages. It is submitted that this is contrary to the law, and adjudged cases.

I. The contract was executory, and the plaintiffs, with full knowledge, received and used the slops. (29 N. Y. 358. 41 *id.* 488, 491.) Their paying for them under protest, does not change the rule. (13 *Abb.* 350. 2 *Sandf.* 481. 12 N. Y. 308.)

II. There were errors committed upon the trial of the cause, which, if necessary, we ask to have examined and passed upon.

III. The defendants' motion for nonsuit should have been granted, upon the grounds specified at the trial, viz:

"1. There is no warranty in the contract nor claimed in the complaint.

2. There was a full performance of the contract by the defendants, and an acceptance and payment by the plaintiffs.

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3. The contract was executory, and the plaintiffs accepted and used the slops delivered them under it by the defendants.

4. The plaintiffs are not entitled to special damages. If the slops were injurious, they took them with full knowledge of their quality, and were guilty of negligence in feeding them.

5. The defendants delivered the slops to the plaintiffs, who received and used them, and the defendants claimed and received pay therefor from the plaintiffs, though the plaintiffs found fault with their quality, and paid under protest. It was the settlement of a disputed claim.

6. No proper damages have been shown."

IV. The judgment should be reversed, and a new trial granted.

D. Pratt, for the respondents.

I. The contract in this case implied that the slops furnished to the plaintiffs, should be merchantable, and fit for the purpose to which it was to be applied. 1. In every executory contract to supply a manufactured article for a particular purpose, there is an implied warranty that it will answer the purpose to which it is to be applied. (*Hilliard on Sales*, 230, § 23. 3 *Stark. Ev.* 1239. 23 *Wend.* 350. 1 *Pars.* 469.) 2. So in every executory contract to furnish manufactured articles, there is an implied warranty on the part of the manufacturer that they shall be of a merchantable quality. (3 *Stark. Ev.* 1239. 23 *Wend.* 350. 29 *N. Y.* 362.) 3. In this case both parties understood that the slop was for feeding cattle to be purchased by the plaintiffs and put into the still barns. 4. The defendants, therefore, contracted to furnish slop that was fit and suitable for fattening the cattle thus to be bought by the plaintiffs.

II. That the defendants wholly failed to perform their contract in this respect, is amply proved. 1. Every dis-

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tiller, who had experience in fattening cattle upon still slops, testified that such slops were worth nothing for fattening cattle. 2. The testimony of the farmers who used it and thought it increased the quantity of milk, is not in conflict with that of the distillers. 3. The small increase in the gain of the cattle, shows that they did not receive the proper feed. 4. The quality of the slops was a question of fact for the referee to pass upon, and as there was a conflict of evidence upon the point, his finding must be deemed conclusive.

III. The defendants, therefore, having failed to perform their contract, it would seem to follow that they were liable in damages for the injury which the plaintiffs have suffered in consequence of such non-performance, unless the plaintiffs have waived performances, or in some other manner discharged the defendants from their obligations to perform.

IV. It is manifest that the plaintiffs have not designed to waive full performance, or to discharge the defendants from such performance. 1. When Mr. Van Buren's attention was called to the quality of the slop, he insisted that the defendants should furnish good slop, and they promised to do so. 2. He paid under protest, and gave them notice that if the cattle did not gain on it sufficiently, he should hold the defendants responsible. 3. Sherlock did not understand there was any waiver, as he told Van Buren if it was not right he had his remedy.

V. There was no design, therefore, on the part of the plaintiffs to waive a strict fulfillment of the contract, and it is equally clear that the defendants are not discharged by any legal quirk or quibble from the consequence of their failure to perform. 1. It is conceded that in an executory contract to furnish a marketable article, where the purchaser has an opportunity to examine it and ascertain its defects, if it be defective, he is bound to give notice

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of the defect, or he will be deemed to be satisfied with it. 2. And when the article can be conveniently returned, he must return it or give notice that it is defective, and will not be received in full performance, or he will be deemed to have waived the defect. 3. But this rule is subject to many exceptions. (3 *Stark.* 1208, 1209. 12 *Mass.* 282. 1 *Mason*, 437. 2 *Smith's J. Cas.* 15-17.) 4. This case is clearly within the exceptions. 5. Again; the plaintiffs were unacquainted with the effect of that kind of slop, and although they were apprehensive, yet their apprehensions were allayed by the assurances of Sherlock that the slop was nutritious, and that the cattle were growing finely. (a.) The quality of the slops could not, therefore, be fully ascertained until the cattle were sold. (b.) A man unaccustomed to feeding cattle with still slop, could not tell by the appearance how fast they were growing, or whether they were growing. 6. In this case, notice was given to the defendants, and that is all that is required by the rule. (1 *Court of App. Cases*, March, 1864, *Judge Allen's op.* p. 39. 29 *N. Y.* 363. 23 *Wend.* 351. 18 *John.* 141. 6 *Taunt.* 108. 14 *Conn.* 411. 2 *Keyes*, 315, 319. 1 *Camp.* 190.) (a.) The court, in the earlier cases, base the rule upon the assumption that the vendor should have an opportunity to replace the defective article, or an opportunity to ascertain whether it was defective or not. (b.) The rule itself, although affirmed in *Reed v. Ramsdell*, is contrary to the analogies of the law as settled in similar cases, and opposed to the opinion of the profession generally. It should not, therefore, be extended. (1 *Smith's Lead. Cas.* 248, 256. 2 *id.* 16, 17, 18, *marg. p.* 5 *Mees. & Wels.* 7. 8 *id.* 858, 871.)

VI. No complaint can be made in regard to the amount of damages, as the referee gave only about one fourth of what the proof showed the plaintiffs to have suffered. 1. The proof showed that the slop, for which the plaintiffs paid \$2371.68, was actually worth nothing. 2. But the plaintiffs were entitled to recover the difference in value

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between slops as they were, and their value if they had been such as the defendants agreed to deliver. (a.) That difference was proved to be at least twelve cents, making \$3162.24. (b.) Interest should be added to the amount. 3. The actual damages to the plaintiffs was the loss upon the cattle in weight.

VII. The objections taken to the admission of testimony are most of them based upon the objection to the entire right of the plaintiffs to recover, and have been already sufficiently discussed.

By the Court, TALCOTT, J. The facts in this case are substantially as follows. In October, 1866, the plaintiffs and defendants entered into a contract, in writing, by which the defendants agreed to rent to the plaintiffs a cattle barn, connected with the defendants' distillery, till May 1, 1867, and also agreed to furnish to the plaintiffs, at the said barn, slops from their said distillery, one hundred and eighty-three bushels of slops per diem, during the term, and the plaintiffs agreed to pay for the slops and the rent of the barn, at the rate of nine cents per bushel of the slops furnished, payable monthly.

The contract was entered into by the plaintiffs with a view of fattening cattle for market, which cattle were to be kept in the barn during the winter. The defendants furnished the amount of slops, from their distillery, specified in the contract. They were received by the plaintiffs daily, and fed to the cattle, and paid for monthly as specified in the contract.

The complaint in the action, after stating the contract, and the placing of the cattle in the barn, proceeds to allege that very soon thereafter the defendants, against the dissent of the plaintiffs, purchased damaged grain, which was totally unfit for the purpose of manufacturing the slops mentioned in the contract, and used the same in their distillery, and from the same manufactured and de-

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livered slops to the plaintiffs, which the plaintiffs refused to receive *as in any way a fulfillment of the contract on the part of the defendants*, and that by reason thereof the plaintiffs have sustained damages. It appears that during the winter the defendants purchased and distilled in their distillery a quantity of grain which had been contained in an elevator at Oswego, that had been burned. That a portion of the slops, and perhaps two thirds, furnished to the plaintiffs were the slops from the damaged grain; and the plaintiffs adduced testimony showing that these slops were full of gravel, ashes and cinders, and were black, and tending to show that they were not fit for the purpose of fattening cattle, and, according to some witnesses, were worth nothing at all, whereas good slops were worth from fifteen to twenty cents per bushel. They also gave evidence tending to show that some of their cattle had gained nothing at all in weight, while the majority of them had gained only an average of fifty-seven pounds per head, whereas they should have gained in weight an average of 200 pounds per head. It appeared that the plaintiffs, on several occasions, complained to the defendants, or their agent at the distillery, that the slops were not good, and on one occasion threatened to sue the defendants on that account if the cattle did not do well. Witnesses on the part of the defendants, who had used the same slops, testified that the quality was good, and that their cattle, fed on them, did well.

The referee finds that the slops furnished to the plaintiffs for 125 days of the time "was inferior, and not merchantable," and that by reason thereof, the plaintiffs sustained damages to the amount of \$1029.37, for which sum he ordered judgment.

Van Buren, one of the plaintiffs, testified that he "knew the quality of the slops all the time it was being fed to the cattle." And the referee finds that the payment for the slops was made after they had been received and used by

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the plaintiffs, and that the plaintiffs did not offer to return any of the slops to the defendants, or give them notice to take any part of them back.

On this state of facts the plaintiffs claim to sustain this recovery, upon the ground that the contract is for the sale and purchase of an article to be manufactured, and that in every such sale there is an implied warranty that the article, when delivered, shall be of a merchantable quality. We do not think the agreement in this case is to manufacture or furnish a manufactured article, in the sense of the rule referred to; or that an article designated no otherwise than as "slops from their distillery," constitutes a manufactured article, within the meaning of the rule which implies a warranty of merchantable quality. A manufacture is defined as "the process of making anything by art, or of reducing materials into a form fit for use by the hand, or by machinery," and it seems to imply a proceeding wherein the object or intention of the process is to produce the article in question. The residuum, or refuse, of various kinds of manufactories is more or less valuable for certain purposes, and may be, and often is, the subject of sale, but it is not expected that the skill and attention of the manufacturer is to be devoted to the quality of the refuse material. This is not the object of the process, and its quality is wholly subordinate, and disregarded, when attention to it would interfere with the most profitable mode or material to be used in the process which is the main object of the manufacturer.

It is not reasonable to suppose that in contracts for the sale of this refuse material, it is the expectation of either party, that the manufacturer is to be controlled in his choice of material or machinery to be used, by any consideration as to the effect which it may have upon the value of the refuse material resulting from the process; and it seems absurd to suppose there can be, in the absence of express contract and of fraud or imposition, any

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responsibility for the quality of what is sold as slops or swill. The plaintiffs had what they bargained for—"slops from the said distillery"—and it would seem reasonable to apply the doctrine of *caveat emptor* to such a sale, if ever.

But, if there were a warranty of merchantable quality implied in such a sale, the plaintiffs would not be entitled to recover in this case, since it appears that they received and consumed the slops, from day to day, with a full knowledge of their quality, and without returning, or offering to return, them, or giving the defendants notice to take them away, or not to deliver any more. This fact, upon well settled principles governing executory contracts of sale, was a complete waiver of the alleged defects. The defendants offered to sell the article at a certain price. The plaintiffs cannot make a different contract for the defendants, or receive and use the article at a less price, without their consent; unless prevented from rejecting it by want of knowledge of, or opportunity to ascertain, the alleged defects.

It is not improbable, from the testimony, that if the plaintiffs had refused to receive and consume the slops in question, the defendants might have obtained the same or a better price from other parties. The, case on this point, seems to be entirely within the principle of *Reed v. Randall*, (29 N. Y. 358.) See also *Hoe v. Sanborn*, (21 N. Y. 552-556,) and *Howard v. Hoey*, (23 Wend. 350.)

The judgment must be reversed, and a new trial must be granted; costs to abide the event.

[FOURTH DEPARTMENT, GENERAL TERM, at Rochester, January 2, 1871.
Mullin, P. J., and *Johnson* and *Talcott*, Justices.]

PRICE vs. THE OSWEGO AND SYRACUSE RAILROAD COMPANY.

Where a carrier delivers goods to a person who has assumed to purchase them of the consignor, in the name of a firm, or to some one authorized by such person, and therefore to the person or persons to whom it was intended by the consignor that they should be delivered, he is not liable to the latter for the value of the goods on the ground that there has been a misdelivery.

Where, in an action brought by the consignor, against the carrier, for the value of the goods, the claim was not that the goods were not delivered to the very party to whom they were intended to be delivered, but that such party had assumed a fictitious name, or had falsely pretended to be doing business as a copartnership, at the place where the order was dated, for the purpose of obtaining the goods without payment; *Held* that the truth or falsity of the representations should have been ascertained by the plaintiff before he parted with his property. And that the omission to do so was his negligence, and not that of the carrier.

A carrier is responsible for the delivery of the property to the party entitled to receive it, according to the address; and delivers it at the peril of being held liable for its value in case of any mistake in that particular. But if he delivers the property to the persons to whom it is addressed and to whom it was intended by the consignor that it should be delivered, the fact that the goods were obtained from the consignor by means of a fraud, and without payment of the price, will not render the carrier liable for such delivery.

Until the consignor, in such a case, shall have repudiated the sale, there can be no strictly legal right, on the part of the carrier, to withhold the property from the actual consignee, any more than though possession of it had been obtained by any other fraud; and upon tender of the freight, by the consignee, is bound to deliver the property to him.

In these days of extensive traffic, carriers could not abide the consequences of a rule which should impose upon them not only the responsibility of delivering the goods to the actual consignee, but that of determining whether the circumstances are not such as lead to a well grounded suspicion that some fraud has, by the use of fictitious names or otherwise, been perpetrated upon the consignor. *Per TALCOTT, J.(a)*

APPEAL from a judgment entered upon the report of a referee, in favor of the defendant.

D. Pratt, for the appellant.

I. The defendant should have been held liable for the loss of the goods, upon the simple ground of negligence

(a) See *McKean et al. v. MaIvor et al.*, (*Law Rep.*, parts 1 and 2, for Jan. and Feb. 1870,) a case very similar to the above, decided by the Court of Exchequer in England.

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alone. 1. The lowest degree of care required of a bailee is ordinary care; that is, the care that a man of ordinary prudence would exercise in regard to his own property. (*Story on Bailm.* § 11.) 2. No man of ordinary prudence, under the circumstances, would intrust his own goods with a perfect stranger, without making some inquiry, or taking some proof as to his identity. 3. The defendant, ordinarily, would not do so in regard to the property of others, for it was proved to be its uniform custom not to deliver goods to a stranger without his being identified, or his proving in some manner his right to receive them. (a.) This custom proves the sense of the defendant itself, in regard to its duty in that respect. (b.) Besides, the plaintiff had a right to rely upon the defendant acting according to its usual custom. 4. Again, the referee finds expressly, that reasonable care and prudence required the defendant to take that precaution before delivering the property. (a.) What is reasonable care must often be a question of fact as well as of law, and the finding of the referee should be deemed conclusive. (*Story on Bailm.* § 11.) (b.) At all events, it should be deemed conclusive, as against the defendant in this case. 5. The defendant, therefore, having been guilty of gross negligence, in delivering the property, is liable to the plaintiff for the damages sustained by him. (*Stephenson v. Hart*, 4 Bing. 476. *Duff v. Budd*, 3 Brod. & B. 177. *Birkett v. Willan*, 2 B. & A. 356.) (a.) These cases are very analogous to the case at bar. (b.) They were attempts to swindle, similar in their circumstances, to the attempt in this case. (c.) It was quite manifest in both of those cases, that the property was delivered to the man who ordered it. (d.) Yet the court held the defendants chargeable with gross negligence, and liable for the value of the property. (e.) The court, in those cases, held the defendants liable, on the ground that they were negligent in the delivery of the goods. In this case, the referee has found the defendant

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negligent, and its liability is therefore established within those cases.

II. The defendant is also liable for delivering the property to a party other than the party to whom it was consigned. 1. The property was consigned to the supposed firm of L. H. Wilson & Co., and if no such firm could be found, the defendant was bound to store the property, and notify the plaintiff. (a.) If the consignee is absent or cannot be found, it is the duty of the carrier to store the property and notify the consignor. (*Fisk v. Newton*, 1 *Denio*, 45.) (b.) The carrier is not protected in delivering the property to a wrong person, although by mistake or upon a forged order. (*Story on Bailm.* 545, b. *Powell v. Myers*, 26 *Wend.* 591.) (c.) It matters not how careful he is, if he delivers the property to the wrong party he is liable. He must deliver to the consignee or some one authorized to receive it. 2. In this case it is clear that the defendant did not deliver it to the consignee or any person authorized to receive it. (a.) It was not delivered to the consignee, for the reason that no such firm existed. So the referee finds. (b.) The property was not delivered to any one authorized to receive it, for the whole scheme was an attempt to swindle, and clearly the rogue was not authorized to receive it. (*Stephenson v. Hart* ; *Duff v. Budd*, *supra*.) 2. It is not material that the property was delivered to the man who originally ordered it. (a.) In the first place there is no legal evidence that the man who received the property was the one who ordered it. (b.) But if it were so, it would not alter the case. (c.) Suppose some person had sent a forged order in the name of some well known house in Oswego, and it had been consigned to that house. Would the defendant be protected by delivering the property to the forger? (d.) It is submitted that the swindler who should use a fictitious name, has no greater authority than if he had forged the name of a real party. 4. In the cases above cited of *Stephenson v. Hart*, and *Duff v.*

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Budd, the property was undoubtedly delivered to the swindler himself, yet the court held that no excuse. (a.) It was remarked by Justice Parker in the former case, that the felon is never the proper person to receive the goods. (b.) As the defendant is found negligent in not having the party claiming the goods identified, his liability follows as a matter of law.

III. The judgment should therefore be reversed, and a new trial granted.

Edwin Allen, for the respondent.

I. The declarations of the party, and what occurred, at the time the bags were called for, were properly admitted in evidence. The receipt given by the party to whom the goods were delivered was also properly admitted in evidence. These declarations, and the giving of the receipt, were a part of the *res gestæ*, and were as competent to be shown as it was to show the delivery of the goods to the person calling for them.

II. The action is brought to recover for the non-delivery of the goods in question to S. H. Wilson & Co., the consignees. As between the plaintiff and defendant, S. H. Wilson & Co. must be deemed to be the owners of the property, and before a recovery can be had here, the plaintiff must show affirmatively that no such delivery was made, and that neither S. H. Wilson & Co. nor the parties ordering them, received the goods; and until this is shown, no liability to the plaintiff is shown.

III. Any delivery which discharges the carrier, as between him and the consignee, is good as against the consignor. (*Sweet v. Barney*, 23 N. Y. 335.) In this case there is no evidence tending to show the goods were not delivered to the consignee. The goods arrived at Oswego and were delivered to the party calling for them the same day they were shipped, (according to the due course of business,) so that no time had elapsed to raise a presump-

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tion of non-delivery, or to change the burden of proof on that point from the plaintiff to the defendant. The burden of establishing that issue was on the plaintiff, and has not been proven or attempted.

IV. The proof shows that the defendants are in the habit of delivering goods to consignees at the depot and at the cars, and not personally to the persons at their places of business or dwellings. And at the customary place of delivery the defendants turned over the goods to the apparent owner, with every evidence (except actual identification) that he was one of the firm, and owner of the goods. The consignee or his agent may receive goods addressed to him, in the hands of the carrier, at any place, either before or after their arrival at their place of destination, and such delivery will discharge the carrier. (11 *Metc.* 509.)

V. The question of negligence on the part of the defendants cannot arise, in this case. There is no such allegation, and no proof tending to show negligence on their part. The defendants exercised much more care and prudence in the delivery of the goods than the plaintiff did in their sale and delivery to the carrier, and he has no just ground to complain of their conduct.

VI. The goods in question were sold, and such a delivery made as would pass the title to S. H. Wilson & Co., and the defendants were only bound to retain the goods for the consignor in case the consignee could not be found. In such case (and in such case only) a new undertaking is implied, and arises on the part of the carrier to retain the goods for the consignor.

VII. The referee's finding of fact that the goods were delivered to the person who ordered them is conclusive on the issue in this case, and the judgment should be affirmed.

By the Court, TALCOTT, J. This is an action by the plaintiff as consignor of certain packages of bags, against the defendant as a common carrier. The complaint alleged

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that the defendant received the property from the plaintiff, and agreed to transport it from Syracuse to Oswego, and there deliver it to S. H. Wilson & Co., to whom the same was addressed; and avers that the defendant did transport the same to Oswego and there deliver it to some person other than S. H. Wilson & Co., whereby the same was lost to the plaintiff. The facts are, that the plaintiff, a dealer in bags, at Syracuse, was induced by a letter signed S. H. Wilson & Co., dated at Oswego, ordering the bags, and requesting the bill to be sent by mail, promising to remit a check for the amount, to send the property, addressed to S. H. Wilson & Co., Oswego, by the defendant's road, without any other address or direction, to the defendant or otherwise, and without having any knowledge who had ordered the goods, or that there was any such firm as S. H. Wilson & Co. at Oswego or elsewhere, or making any inquiries for the purpose of ascertaining such fact. The defendant transported the bags to Oswego. On their arrival at that place, a person, whom the referee finds was the person who ordered the bags, or his authorized agent, applied for the bags as in behalf of S. H. Wilson & Co., paid the freight on the same, received them, and gave a receipt therefor in the name of S. H. Wilson & Co. The letter to the plaintiff, signed S. H. Wilson & Co., was a fraudulent contrivance to get the bags from the plaintiff, without paying for them. There was no such firm as S. H. Wilson & Co. at Oswego, or, so far as can be discovered, elsewhere. And the party to whom the bags were delivered is unknown. The referee finds that it was the usual custom of the defendant not to deliver goods to a stranger without his being identified, or his satisfying the defendant by papers or otherwise, that he was entitled to receive the same. The plaintiff drew on S. H. Wilson & Co., at Oswego, for the price of the bags, but no such firm being found, they instituted inquiries for the property, and applied to the defendant at Oswego on the subject. This

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was about a month after the delivery of the bags to the unknown person, and was the first notice given to the defendant, that there was anything in the transaction out of the usual course of business. On these facts, the referee held that the defendant was not liable to the plaintiff for the value of the bags, and in this conclusion we think the referee was correct. The contrary would impose a most unreasonable burden and responsibility upon the carrier, and shift from the vendor, to the carrier, the duty of that vigilance and care, in reference to the parties to whom the vendor proposes to commit his property, which he, as the owner, is expected to take upon himself.

The carrier is responsible for the delivery of the property to the party entitled to receive it, according to the address, and delivers it at the peril of being held liable for the property in case of any mistake on this subject. Even if he deliver it on a forged order, or to the wrong person, induced by any sort of imposition upon him, he is not excused. It is for his own security, therefore, that the carrier requires to be satisfied of the identity or authority of the persons applying for the property, as no amount of care on this subject will excuse him from liability if he makes a mistake, and delivers to the wrong person.

Absolute personal identification of every individual consignee, by proof that he is the party named in the address, is not always practicable, and is sometimes impossible, from the fact that goods are often addressed by initials, or by arbitrary marks. Other means are resorted to, often, for the purpose of ascertaining whether the party applying is the party who it was intended should receive the property, such as acquaintance with the contents of the package, &c. These are precautions which the carrier takes on his own behalf, and if he makes a correct delivery he is not liable though he has taken none of these precautions; whereas, if he delivers to the wrong party, he is liable, whatever precautions he may have taken. In the case of

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Sweet v. Barney, (23 N. Y. 335,) it was held, in accordance with the previously settled rule, that the consignee is the presumptive owner of the thing consigned, and where the carrier is not advised that any different relation exists, he is so to treat the consignee, and in the absence of any notice to the contrary, a delivery which discharges the carrier as between him and the consignee, is good against the consignor. Here the goods were delivered to the party who had assumed to purchase them in the name of S. H. Wilson & Co., or to some person authorized by that party, and therefore to the person or persons to whom it was intended by the consignor they should be delivered.

The claim is not that the goods were not delivered to the very party to whom they were intended to be delivered, but that such party had assumed a fictitious name, or had falsely pretended to be doing business as a copartnership, and to be doing business at Oswego. These things should have been ascertained by the plaintiff before he parted with his property. Not to ascertain them was his negligence, and not that of the railroad company.

Even if the defendant had known, what it did not know, that the party applying for the property did not reside in Oswego, and did not belong to any firm doing business under the name of S. H. Wilson & Co., as the plaintiff had a perfect right to consign the property in that manner, and the consignee to have it so consigned, and to receive it under that name, it is not easy to see how the defendant could refuse to deliver the property, after being satisfied that the party applying for the goods was the real party intended; unless it had also had notice that the plaintiff has been acting under mistake or imposition as to these facts. It is not an unusual occurrence that goods are intentionally forwarded to, and received by parties, without address, except arbitrary marks, or even by fictitious names. Again; how could the defendant have resisted an action to recover the property, or its value, after

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a tender of the freight? The plaintiff could undoubtedly avoid the contract of sale on the ground of fraud; but this the plaintiff alone could elect to do. The defendant could not do it for him.

If the defendant had been apprised of the facts, it would probably have assumed the responsibility of detaining the property upon the assumption that the plaintiff would, when apprised of the facts, repudiate the sale. But there could be no absolute and legal certainty of this. And until the plaintiff should repudiate the sale, there could be no strictly legal right on the part of the defendant to withhold the property from the actual consignee, any more than though it had been obtained by any other fraud.

To purchase personal property with a preconceived design not to pay for it, is held to be a fraud for which the vendor may avoid the sale. Yet it is presumed no one would think of holding a railroad company who should deliver to a country merchant property consigned to him from New York, liable to the vendors for the property, no matter what notice, or reason to believe, that the consignee had purchased the property when in failing circumstances, or with a preconceived design not to pay for it, the agents of the railroad company may have had.

The counsel for the plaintiff refers us to three English cases, decided many years ago, and in regard to carriers, the extent of whose business would bear little comparison with that of a railroad company of the present day; which cases, he claims, settle the right of the plaintiff to recover in this case. They are as follows: *Duff v. Budd*, (3 *Brod. & Bing.* 177;) *Birkett v. Willan*, (2 *B. & A.* 356,) and *Stephenson v. Hart*, (4 *Bing.* 476.) There is considerable similarity between the facts in those cases and the one at bar. In the first two, however, it was not proved, or claimed, that the property had been in fact delivered to the party who had ordered it. In *Birkett v. Willan*, the court on the trial had instructed the jury that

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where "a parcel was directed to a person, generally, in such a place as Exeter, without specifying his place of abode, the carrier was not bound to carry that parcel to any place, but he would fully discharge his duty by delivering it at his office, to any person coming from the person to whom it was so directed, or whom he might *reasonably suppose* to come from that person; and left it to the jury to say whether, under the circumstances proved, the defendant had *reasonable ground for thinking* that the man to whom he did deliver the parcel, came from the person to whom it was directed." And a new trial was ordered, on the authority of *Bodenham v. Bennett*, (4 Price, 31,) which holds that the carrier is not excused for misdelivery by the fact that he had reason to suppose the delivery to be correct. In *Duff v. Budd*, the plaintiffs had received an order for goods from Oxford, signed by J. Parker. They made inquiries, and ascertained that Mr. Parker, of High street, Oxford, was a respectable tradesman there, and forwarded the parcel by a carrier, directed to "Mr. J. Parker, High street, Oxford." The Mr. Parker who dealt in High street, Oxford, was William Parker, and he, on being applied to by the defendant's servants, knew nothing about the parcel. The servants of the defendant afterwards delivered it to a person who saw it in the office, addressed as aforesaid, and claimed that it was intended for him. There was no evidence, however, that he was the party who had ordered it, nor was it so claimed, and the decision was put principally on the ground that as the parcel was specially directed to High street, Oxford, the defendant, who had delivered it elsewhere, was liable. Of course, if it had appeared that the party to whom the parcel had been delivered was the J. Parker to whom it was directed, a different question would have been presented.

Stephenson v. Hart more nearly resembles the present case, in its features. There a person calling himself West

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had, by means of a fictitious bill, with forged indorsements, purchased goods of the plaintiffs, and directed them to be sent to a certain number, Great Winchester street, London. The carrier took the box to the number indicated, and no such person could be heard of at that place. Afterwards the carrier received a letter from St. Albans, signed with the name to which the box was addressed, requesting that it might be sent to a certain inn at St. Albans, which was accordingly done. In this case, from the facts, there was little doubt but that the same party who received the goods at St. Albans was the party who had purchased the goods and passed the forged bill; and on motion for a new trial, it was, among other things, claimed that this was a material fact, and should have been left to the jury. The decision of the case was placed upon the ground that the box, instead of being delivered at its address in London, had been sent to St. Albans, contrary, as the jury found, (that question having been left to them,) to the usual course of business of the defendants.

In regard to the claim that the box was delivered to the person for whom it was intended, Park, J., who delivered the principal opinion, holds the following language: "The argument which has been raised for the defendants, by the assertion that the box has been delivered to the right person, is answered by saying that a felon cannot be the right person. And as to the defendants' liability to an action at the suit of West, till it was ascertained that the bill he had given would not be honored, such an action might have been well defended by showing that the box was tendered at Great Winchester street, and that no such person was known there." This is not very satisfactory reasoning. The remark that a felon cannot be the right person, is more rhetorical than correct. True, a felon ought not, as a question of right, as between him and his victim, to receive the property, and in that sense is not the right person; but, nevertheless, he may be the only

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person who, as between him and the carrier, is entitled to receive the goods, as the learned judge seems to concede would have been the case had he appeared to receive the box when tendered at Great Winchester street. Neither is the answer to the fact that the carrier would have been liable to an action at the suit of the consignee, quite satisfactory. Of course, if nothing else had transpired except the abortive attempt to deliver at Great Winchester street, that attempt would have been a good answer to an action. But if the learned judge meant to say that the failure of the attempt to deliver at Great Winchester street would have authorized the carrier to retain the property against any subsequent demand of the consignee, the proposition is not maintainable.

Clearly, however, the case of *Stephenson v. Hart* does not establish the right of the plaintiff to recover in the case at bar, because it concedes that if the consignee was at the place of the address on the arrival of the property, and there received it, the carrier would not have been liable.

That was this case. The goods were directed, generally, to Oswego. The place of delivery was, on demand, at the depot of the defendant. They were there demanded and received by the party who had purchased them, and to whom they were in fact directed, though probably under a fictitious name. In these days of extensive traffic, carriers could not abide the consequences of a rule which should impose upon them, not only the responsibility of delivering the goods to the actual consignee, but that of determining whether the circumstances are not such as lead to a well grounded suspicion that some fraud has, by the use of fictitious names, or otherwise, been perpetrated upon the consignor.

The judgment must be affirmed.

[FOURTH DEPARTMENT, GENERAL TERM, at Rochester, January 2, 1871.
Mullin, P. J., and *Johnson* and *Talcott*, Justices.]

WILLIAM V. K. LANSING and WILLIAM R. LANSING vs.
STEPHEN COLEMAN.

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One not authorized to make a sale of property, by its owner, but simply to advertise it for sale and procure some person to negotiate with the owner, cannot make a representation or warranty respecting it which will be binding upon the owner, without his authority or knowledge.

Such an agent is not clothed with any real or apparent authority to make any representations on the subject.

The defendant, having an interest in a manufacturing copartnership which he wished to sell, requested R. to procure a purchaser for the same, agreeing, in case he did so, to give him a certain portion of the purchase money, if a purchaser at a certain price was found. There was no evidence of any representations made by the defendant to R. or of any express authority to R. to make any representations or statements respecting the property; and no proof of any knowledge on the part of the defendant that any representations or statements had been made by R.; nor was there any authority given to R. to make a sale of the property. *Held* that representations made by R. to the plaintiffs, prior to a negotiation between the latter and the defendant, for the purchase and sale of the property, were not admissible in evidence against the defendant. *Held, also*, that the case was within the principle laid down in *Smith v. Tracy*, (86 N. Y. 79.)

Held, further, that proof of such representations could not be deemed immaterial, inasmuch as the defendant himself was proved to have made the same representations, at the time of the sale; because the court could not see that the jury might not have based their verdict, to some extent, on the representations claimed to have been made by R.

THIS was an action in the nature of an action on the case, for false and fraudulent representations made by the defendant to the plaintiffs, whereby they were induced to purchase from the defendant his interest in a certain fruit-jar business.

The plaintiffs alleged, in their complaint, that on the 17th day of July, 1868, the defendant being engaged in business, at Rochester, with another person or persons, in the manufacture and sale of Spencer's patent fruit jar, and having offered to sell out the undivided one half of the patent for making said jar, one half of the stock on hand, one half of the accounts and debts due to him and his associates, in the business so carried on by him for

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the year 1868, and one half the profits thereof accruing since January 1, 1868, did, with intent to deceive and defraud the plaintiffs, falsely and fraudulently represent to them that the said business as theretofore conducted by him was a profitable business; that they had sold in said business upwards of 2500 gross of jars during the year 1868, at a profit of \$5 per gross for each gross so sold; that the business had realized upwards of \$10,000 profits, one half of which would accrue to the plaintiffs; that the accounts due and appearing upon his books to him and his associates in said business were all good accounts, for goods actually sold and delivered by him and his associates, and amounted to between \$12,000 and \$14,000, and exceeded \$12,000, and would be paid so as to enable the plaintiffs to meet the liabilities which they were assuming in the purchase of said business; that the persons conducting said business only owed for glass jars to a firm of Southwick & Reed, the greater part of which would not mature until the fruit season of 1869, meaning the summer of 1869. That the plaintiffs, relying upon said representations, purchased of the defendant his interest in said business, including stock on hand, patent, and accounts and profits accruing after January 1st, 1868, and received a bill of sale or agreement, (a copy whereof was annexed to, and formed part of the complaint,) from said defendant, and paid him therefor \$10,000, partly in cash and partly by conveyance of real estate by way of mortgage, executed by the plaintiff, William R. Lansing, and bond accompanying the same. That in truth, and as the defendant then well knew, said representations were false, and said business had not realized a profit of \$10,000 for the year 1868, nor had such profit accrued, nor had the defendant and his associates sold 2500 gross of jars, at a profit of \$5 per gross, nor had they sold to exceed 1588 gross of jars, nor were the accounts upon the books of the defendant and his associates, accounts for goods actually

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sold and delivered, but were deficient in at least the sum of \$4340, as follows:

On the books.		Deficiency.
F. Wetmore & Co., . . .	\$4,800	\$2,390 45
Talbot, Winslow & Co., . .	1,000	500 00
J. D. Brown & Co., . . .	1,428	900 00
Tracy, Avery & Sturgis, . .	1,050	550 00
		<hr/> \$4,340 45

Nor was there enough due to pay and meet the liabilities incurred by the plaintiffs in their purchase aforesaid, nor was there any arrangement between said Barnes and his associates with said Southwick & Reed, to carry on or extend any payment until the season of 1869, nor was the sum of \$7000 all there was due or to grow due to them, said Southwick & Reed, within sixty days from the 17th day of July, 1868, but on the contrary, there was on that day, \$23,000 due them from said Barnes and his associates. That by reason of the premises the plaintiffs were misled by the defendant to their damage, \$10,000. Wherefore the plaintiffs demanded judgment for the damages sustained by them by reason of the premises, with costs.

The defendant, by his answer, admitted that he made the sale to the plaintiffs according to the terms of the instrument set out in the complaint; but denied that he made the representations to the plaintiffs alleged in the complaint, or any of them. And alleged that all the representations made to the plaintiffs by the defendant were true and correct; and that the books of account of the defendant and his associates were correct, and there was not, in fact, the deficiency alleged in the complaint, or any deficiency. And he denied each and every other allegation in the complaint.

On the trial, at the Monroe circuit, the plaintiffs offered to prove that the false representations alleged in the complaint had been made by Russell. The testimony was

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objected to, and the objection overruled, and the evidence received. Evidence was then given of the statements made by Russell. The only authority of Russell to make such statements is found in his testimony. He testified that in 1867 and 1868 he was travelling agent for Coleman & Barnes, in the sale of the Spencer fruit jar; that in July, 1867, or 1868, he was employed by Coleman to find a purchaser for his interest in the property; and he procured the Lansings to purchase; communicating to them the fact that he had been employed by Coleman, though he did not state to them that he had been employed by Coleman to sell his interest in the business; that the facts in relation to his employment by Coleman to procure a sale of such interest were as follows: "I met Mr. Coleman in the Arcade, and he wanted to know if I didn't think I could find some one to purchase his interest in the jar, and I told him I thought likely, perhaps I could; and he said if I could he would make it right with me; I think I asked him what his price was, and he told me \$10,000, and I asked what he would give me if I would find him a purchaser, and he said if I would find him a purchaser for \$10,000 he would give me \$2000 of it. I think a week or so after that I met Mr. Coleman at another place, at the Lager Beer Garden, on Clinton street, one evening, and he wanted to know if I had found any one to purchase then, and I told him I hadn't then, and some other conversation came up. He made another proposition to me then; he said if I found some one, that he would give me \$3000 if he got \$10,000, and if he only got \$9000 I was to have only \$2000." Russell subsequently made certain representations to the plaintiffs, in relation to the business, but Coleman was not informed that any representations had been made. Finally the parties met, and had a conversation, at which Russell was present. Certain statements were then made by Coleman respecting the extent and profitableness of the business,

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amount of debts, &c.; at the close of which the plaintiffs bought a half interest in the patent, and a half interest in the right to manufacture and sell, and the contract mentioned was executed.

The plaintiffs gave evidence tending to prove the falsity of the representations made by Russell, as well as of those made by the defendant himself.

The jury found a verdict in favor of the plaintiffs, for \$2557.09; and the court ordered the exceptions to be heard, in the first instance, at the general term.

Geo. F. Danforth, for the plaintiff.

I. The representations of Russell were admissible. 1. He was employed by the defendant to find a purchaser for the property in question. 2. And did procure the plaintiffs to buy the property of the defendant. 3. His agency was thus directly proven. Its scope was to find a purchaser for the property—for success in which, he was to be paid. 4. The representations were directly connected with the object of this agency, and for these reasons were admissible. They were within the scope of his agency, and part of the *res gestæ*. (2 *Cowen & Hill's Notes to Phill. Ev.* 181.) A broker authorized to sell may bind his principal by warranty. (*Andrews v. Kneeland*, 6 *Cowen*, 354. *Boorman v. Jenkins*, 12 *Wend.* 566. *Waring v. Mason*, 18 *id.* 425. *Nelson v. Cowing*, 6 *Hill*, 336.) An agent to sell sheep knew that they were diseased, and sold them without communicating the fact; the principal was held liable for the deceit. (*Jeffrey v. Bigelow*, 13 *Wend.* 518.) So he is liable for an agent's representations as to quality, relied upon to show fraud in the sale, the benefit of which was received by the principal. (*Welch v. Carter*, 1 *Wend.* 185, 190, 191. 1 *Pars. on Cont.* 62.) 2. The representations made by Russell were reiterated by Coleman. And every fact was established which was essential to make out the plaintiff's case. The defendant adopted and received the fruits of

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the representations for his own use and benefit, and is thus directly within the principle upon which the following cases were decided: *Bennett v. Judson*, (21 N. Y. 238;) *Elwell v. Chamberlin*, (31 id. 611;) *Henry v. Root*, (33 id. 526;) viz: "These authorities rest upon the principle that when a party clothes another with authority to speak in his behalf, and indorses him to third persons as worthy of trust and confidence, those who are misled by the falsehood and fraud of the agent are entitled to impute it to the principal. The latter will not be permitted to retain the fruits of a transaction infected with fraud, whether the deceit, which he seeks to turn to his profit, was practiced by him or by his accredited agent. In such a case he cannot separate the legal from the illegal elements of the contract, and appropriate the advantages it secures, while he rejects the corrupt instrumentalities by which they were obtained." In these and like cases the duty rests upon the agent to communicate to the principal the means and instrumentalities employed by him in the prosecution of his agency; and the latter may very well be charged as one having received such information and voluntarily adopting the agent's acts and representations. (*Story on Agency*, § 140. 4 *Paige*, 127. 2 *Hill*, 461.)

II. A new trial should therefore be denied, and the judgment affirmed, with costs.

J. C. Cochrane, for the defendant.

I. Russell had no authority to sell the business, or make a contract or receive the money. He was only a drummer to find a purchaser. If he was an agent at all, it was with the most special and limited authority. He was simply to find a purchaser and bring him to Mr. Coleman. Then his duty was ended. He was not authorized and did not assume to do anything whatever for Coleman. The agency of Russell did not extend to anything connected with the sale. He was not employed to take any part in

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the sale. We submit that Russell had no authority to make any representations whatever in regard to the property; that what he did say could form no part of the sale, and did not form any part of it; his statements, therefore, were clearly incompetent. If he had been authorized to make any contract with the purchaser which would bind Coleman, the case would be different.

II. New York merchants employ drummers to find purchasers. They are really the agents and servants of the parties employing them. Suppose a drummer finds a purchaser and makes representations in regard to the quality of the goods. He takes him to the store and the salesman makes a bargain, and sells a bill of merchandise. In an action for these goods, is it a good defense to show that the representations of the drummer were false? The simple answer is, that the drummer was not authorized to make the sale and did not pretend to make it. What he said, therefore, was no part of the sale. Or, suppose a party has a piece of real estate to sell, and applies to a broker to find a purchaser, and then the owner himself makes the sale. Is he liable for unauthorized statements made by the broker?

III. The agency of Russell was less than that of a drummer. Was it an agency at all? A drummer has regular employment in a continuing business. Russell had no employment. He was under no obligation whatever to Coleman. It was not his duty to make any effort to find a purchaser. He was not employed for that purpose. It was merely a matter of contract. Coleman simply said, if you find me a purchaser I will give you so much. Russell might do so or not. If he did, he would accept the proposition of Coleman. He would complete the contract on the instant. There would be no other employment or agency, whatever.

IV. If Russell made false representations to the plaintiffs, he did so upon his own responsibility. For these

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representations, if the plaintiffs have any cause of action, it is against Russell and not against Coleman. This does not come within the class of cases where a party has been clothed with apparent authority, and makes representations which were not in fact authorized. In this case the plaintiffs did not act on the supposition that Russell was the agent of Coleman. Russell did not pretend to be an agent, and the plaintiffs did not receive his statements as such.

V. There was no ratification of the acts of Russell by Coleman. Coleman was not informed of any statements that Russell had made, and did not know that he had made any. The payment to Russell according to his contract, was therefore no ratification of what he had done beyond it. The receipt of the \$10,000 was no ratification of any act of Russell. It was not the fruit of any bargain he had made. It was the sum owing by the terms of the contract made by Coleman himself. *Non constat*, he might have made the contract even if Russell had not introduced the plaintiffs. Had Russell made the contract as agent for the defendant, the reception of the money would have been a ratification of what Russell had done. But as Russell did not make the contract, or pretend to make it, the performance of the contract, by either party, could not be a ratification of an act by a stranger foreign to the contract. (*Coyle v. City of Brooklyn*, 53 Barb. 56. *Smith v. Tracy*, 36 N. Y. 79.) The fact that Coleman, at a time subsequent to the representations by Russell, and without knowing that they had been made, entered into a contract with the plaintiffs, was no ratification of the representations.

By the Court, TALCOTT, J. This is an action for fraudulent representations alleged to have been made by the defendant, on the sale to the plaintiffs of the defendant's interest in a copartnership engaged in the manufacture and sale of the Spencer fruit jars. In addition to the testimony concerning the statements made by the defendant

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at the time of the sale, the plaintiffs were allowed, against the objection and exception of the defendant, to give in evidence certain representations made by one Russell to the plaintiffs, preliminarily to the negotiation between the plaintiffs and the defendant. The only connection between the defendant and Russell in reference to the matter, was, that the defendant had previously requested Russell to procure a purchaser for the property in question, and agreed, in case he did so, to give him a certain portion of the purchase money, if a purchaser was found at a certain price. There was no evidence of any representations by the defendant to Russell, or of any express authority to Russell to make any representations or statements, and no proof of any knowledge on the part of the defendant that any representations or statements had been made by Russell; nor was there any authority given to Russell to make a sale of the property.

Under these circumstances, we think the representations made by Russell were not admissible in evidence. Russell was not clothed with any real or apparent authority to make any representations on the subject. To hold that a person not authorized to make a sale, but simply to advertise the property for sale, and procure some one to negotiate with the owner, can make representations or warranties binding upon the owner, without his authority or knowledge, would be too dangerous. The well known office of such an agent is merely to initiate a negotiation, not to complete one. The parties proposing in such a case to purchase, are necessarily referred to the principal, for the actual negotiation, and there is no hardship in requiring, but on the contrary, common prudence, and justice to the vendor, would seem to demand, that the purchaser should go to him for the facts which are to influence the purchase. There was no ratification of any representations made by Russell in this case, as it does not appear that the defendant had any knowledge of, or

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reason to suppose that any representations had been made. We think the case is within the principle laid down in *Smith v. Tracy*, (36 N. Y. 79.)

It is urged by the plaintiffs that the testimony on this subject was immaterial, inasmuch as it is claimed that the defendant himself was proved to have made the same representations at the time of the sale. We cannot see, however, that the jury may not, as they might under the ruling of the court, have based their verdict to some extent on the representations claimed to have been made by Russell.

A new trial must be granted, costs to abide the event.

[FOURTH DEPARTMENT, GENERAL TERM, at Buffalo, February 6, 1871.
Mullin, P. J., and *Johnson* and *Talcott*, Justices.]

JOHN C. SIGEL vs. AUGUSTA JOHNS, impleaded, &c.

Where a married woman, since the acts of the legislature, of 1860 and 1862, concerning the rights and obligations of married women were enacted, being possessed of real estate as her separate property, bargains and sells the same, and joins with her husband in a deed thereof, which contains covenants of seisin, of warranty, and against incumbrances, such covenants are binding and obligatory upon her, so far as to render her separate property liable for their non-performance.

And an action will lie against her, to recover damages for a breach of the covenant against incumbrances, in the same manner as if she were sole; the object of such action being to satisfy the plaintiff's demand, out of her separate estate.

The statute, neither by its language, nor its fair import, requires the complaint, in such an action, to show that the defendant has separate property.

The effect of the act of 1860 is that, in the actions provided for, the defendant may, though married, be sued and prosecuted precisely as if she were a single woman.

But this construction does not extend the section prescribing the obligation by means of the covenant beyond its ordinary and natural import; for it can in no possible event render the liability greater than that declared by the statute; as nothing more than the defendant's separate property can be taken for the purpose of satisfying the judgment.

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APPEAL from an order made at a special term, overruling demurrer to complaint.

Cary & Bolles, for the appellant.

Angel & Finch, for the respondent.

By the Court, DANIELS, J. The complaint in this cause shows that the defendant Augusta A. Johns was the owner of certain real estate situated in Olean, in her own separate right; and that she, together with her husband, executed and delivered to the plaintiff a deed of conveyance of the same, for a valuable consideration. That such deed contained covenants by which the defendants jointly, as husband and wife, covenanted that they were well seised of the premises conveyed, free and clear of incumbrances, and that they would forever warrant and defend them in the quiet and peaceable possession of the plaintiff, his heirs and assigns, against any person whomsoever lawfully claiming the same, or any part thereof. And that at that time they were incumbered by a mortgage which was afterwards foreclosed, and on which the premises were subsequently sold. No allegation was made that the defendant Augusta Johns was the owner of any separate estate whatever, beyond the premises conveyed to the plaintiff. A general demand of judgment was made for the damages sustained by the plaintiff by means of the breach of the covenants in question.

The defendant Augusta Johns demurred to the complaint, assigning several grounds of demurrer, but the only one relied upon was that which averred that the complaint did not state facts sufficient to constitute a cause of action against her. The special term gave judgment for the plaintiff, upon the demurrer, and the defendant Augusta Johns appealed.

The deed referred to in the complaint was executed and

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delivered in the year 1866, and it was therefore subject to the provisions of the statutes enacted by the legislature, concerning the rights and obligations of married women, in the years 1860 and 1862. By the first of these statutes it was provided that any married woman possessed of real estate as her separate property, might bargain, sell and convey it, and enter into such covenant or covenants for title as are usual in conveyances of real estate, which covenants should be obligatory to bind her separate property in case the same or any of them be broken. (4 *N. Y. Stat. at Large*, 516, § 3.) Under this provision the covenants contained in this deed were binding and obligatory upon the defendant Augusta Johns, even though she was a married woman, so far as to render her separate property liable for their non-performance. And by the next section of the statute it was further provided that in all matters relating to the separate property of a married woman, she may sue and be sued in the same manner as if she were sole. (*Id.* § 7.)

There can be no doubt but that a single female could be sued in a common action at law upon such a covenant; and as that is the case, there can be as little room for doubt, under this provision of the statute, but that a married woman may in such a case be sued in the same manner. The legislature have prescribed that as the law, in clear and express terms. The subject of the suit is a matter relating to the separate property of the defendant as a married woman. It is to effect satisfaction of the plaintiff's demand out of such property that the action is brought; and for that reason it is within the clear signification of the terms made use of in the section last referred to. This statute, neither by its language nor its fair import, requires the complaint to show that the defendant has separate property; for no such fact could be required to be alleged in an action upon a similar covenant against a single woman. And in the cases provided for, the action

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may be brought in the same manner as though it was against a sole and unmarried female; and that would not be done if the allegation were required that the defendant had separate property. The effect of the statute is, that in the actions provided for, the defendant may, though married, be sued and prosecuted precisely as if she were a single female. (*Barton v. Beer*, 35 Barb. 79.) This construction does not extend the section prescribing the obligation by means of the covenant beyond its ordinary and natural import; for it can in no possible event render the liability greater than that declared by the statute; as nothing more than the defendant's separate property can be taken for the purpose of satisfying the judgment.

If any doubt could exist as to the propriety of this construction, it would be removed by the last section of the act of 1862; for that provides that a married woman may be sued in any of the courts of this State, and whenever judgment shall be recovered against her, it may be enforced by execution against her sole and separate estate, in the same manner as if she were sole. (4 Gen. Statutes N. Y. 517, § 7.) This section is even broader than section seven of the act of 1860, in this respect; because it has provided for the sale of her property by means of legal process, in cases where she may have rendered herself liable to an action, in the same manner as if she were sole. This liability may be enforced in any of the courts in this State, which could not be the case if only equitable actions could be maintained against her for the purpose of satisfying demands out of her separate property. The provisions contained in the Code, relating to suits against married women, were enacted in the same spirit; for they contemplate the recovery of damages against her, and provide for their collection, with costs, by means of process by execution for the levy and sale of her separate property. (Code, § 274; *subd.* 4, § 287.)

In very many respects the legislature have conferred

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upon married women the capacity, powers and privileges of single females; and so far as that has been done, it seems to have been the policy of the laws to subject them to a corresponding degree of legal as well as equitable liability. There was no good reason why that should not have been the case. Her own adequate protection, as well as the rights of persons dealing with her under her enlarged legal capacity, required that it should be done. There would have been no reason or justice, whatever, in conferring upon a married woman the legal powers and privileges of a single female, and at the same time withholding from those who acquired rights against her, by means of the use and enjoyment of those powers and privileges, all legal means of redress. The latter were as essential for the protection of persons dealing with her, as the former were for her own prosperity and profit.

Under the statutes referred to, the complaint in this cause did state facts sufficient to constitute a cause of action against the defendant, and the order appealed from should therefore be affirmed, with costs.

Order affirmed.

[ERIE GENERAL TERM, November 21, 1870. *Marvin, Daniels and Talcott*, Justices.]

GEORGE H. BENNETT vs. HUGH McGUIRE, MARTIN ARM-
STRONG and BRIDGET McGUIRE.

A judgment creditor, after instituting proceedings supplementary to execution, against his debtor, may abandon such proceedings, and commence an action, in his own name, to set aside assignments of a bond and mortgage, by the debtor and his assignee, as without consideration and fraudulent and void as to him, instead of proceeding in the name of a receiver appointed under section 299 of the Code.

Conceding that where a receiver has been actually appointed, the action should be brought by him, such is not the rule in all cases. The principle authorizing a receiver to sue in certain cases, is not in the way of an action by a judgment creditor, in the nature of a creditor's bill, for the purpose of having an assignment or other disposition of property by the debtor declared fraudulent, and the property applied to the satisfaction of the judgment.

M., a debtor of the plaintiff, who was insolvent, owing debts to various persons, assigned a bond and mortgage owned by him, to A. without consideration, by an instrument expressing the nominal consideration of one dollar, and A., on the same day, and for the same consideration and no other, assigned such securities to M.'s wife; the assignees receiving such transfers without paying or securing, or becoming liable to pay, therefor, any consideration whatever. *Held* that a fraudulent intent on the part of M. to prevent the plaintiff from collecting his demand, might be presumed; and that it might be fairly inferred, from the facts and circumstances, that A. and the wife of M. had full knowledge of such fraudulent intent.

Even if it be conceded that in some cases fraud will not be inferred from the want of consideration, alone, yet the question of fraudulent intent is a question of fact; and where there is sufficient evidence to sustain a finding of fraudulent intent, it cannot be disturbed.

Where fraudulent assignments made by a judgment debtor are obstacles in the way of a creditor's collecting his demand, all who have participated in creating them are properly made parties to an action to set the assignment aside.

Where improper testimony is admitted, which may have influenced the mind of the judge, before whom an action is tried, the judgment cannot stand.

In an action against a judgment debtor and his assignee, to set aside assignments of securities made by him in fraud of creditors, the testimony of the debtor, taken upon his examination in proceedings supplementary to execution on the plaintiff's judgment, is inadmissible as against the assignee, and the wife of the debtor, who has taken a subsequent assignment of the securities, from such assignee.

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THE action was brought to set aside two assignments of a bond and mortgage as fraudulent, and was tried at a special term in Saratoga county, before Justice BOKES, without a jury, in January, 1871. It appeared upon the trial that the defendant Hugh McGuire, at the commencement of the year 1870, and while owning and living upon a certain farm, situated in the county of Saratoga, became indebted to the plaintiff. That on the 4th day of May, 1870, the plaintiff recovered a judgment upon said claim, against said Hugh, for the sum of \$203.10 damages and costs, before a justice of the peace in said county. That on the 11th day of May, 1870, a transcript of said judgment was duly filed, with the clerk of the proper county; an execution issued to the sheriff of the county in which said Hugh resided, and by said sheriff duly returned wholly unsatisfied. That on the 24th day of said May, said Hugh was duly examined pursuant to section 292 of the Code. That on the 30th day of said May, the defendant Martin Armstrong was duly examined in said proceedings, pursuant to section 294 of the Code. That no receiver in said proceedings has been appointed. That on the 18th day of April, 1870, and after the plaintiff's debt had accrued, the defendant Hugh was the owner and possessor of a certain bond and mortgage of the value of \$1000, executed by John Burke and wife, which mortgage was a valid lien upon said farm. That on said 18th day of April, the defendant Hugh assigned and transferred said bond and mortgage to the defendant Martin Armstrong, without consideration, by an instrument in writing, with the nominal consideration of one dollar expressed therein, without any covenants or agreement to pay any sum whatever. That at the same time, and for the same consideration mentioned, and no other, said Martin Armstrong assigned and transferred said bond and mortgage to the defendant Bridget McGuire, the wife of said Hugh. That at the time of said transfers said Hugh was insolvent,

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and had no other property whatever, and was indebted to various persons, in divers sums. That said indebtedness or judgment of the plaintiff against said Hugh, still remains unpaid, and in consequence of the aforesaid assignments of said bond and mortgage, the plaintiff has been unable to collect the same. Upon the trial a motion was made by the defendants for a nonsuit, and objections made to the admission of testimony, and overruled; which are stated sufficiently in the opinion. The judge found that said transfers of the bond and mortgage were made by the defendants without consideration, and for the purpose of defrauding the creditors of said Hugh, in the enforcement and collection of their debts; that they did have that effect, and each of them was and is fraudulent and void as to said creditors; and that the plaintiff was entitled to have his judgment satisfied from said bond and mortgage, with costs; and he directed the appointment of a receiver to collect the same. Judgment was entered. The defendants appealed from the judgment, to the general term.

J. W. Eighmy, for the appellants.

I. The court erred in denying the motion for a nonsuit. This action should have been brought in the name of a receiver, in pursuance of section 299 of the Code, and not in the name of the judgment creditor. Section 299 reads as follows: "If it appear that a person or corporation, alleged to have property of the judgment debtor or indebted to him, claims an interest in the property adverse to him, or denies the debt, such interest or debt shall be recoverable only in an action against such person or corporation, by the receiver," &c. The defendants Armstrong and Bridget are such persons, denominated in this section. Bridget purchased the mortgage and now claims to hold it adverse to Hugh, and it so appeared upon the examination in said proceeding, or there would be no occasion for this suit. Then the whole subject came under section 299,

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and an action to set aside the assignments should have been brought in the name of a receiver. (*Edmonston v. McLoud*, 19 Barb. 357. *Rodman v. Henry*, 17 N. Y. 484. *Hammond v. H. R. I. & M. Co.*, 20 Barb. 383. *Locke v. Mabbett*, 2 Keyes, 457. *Sherwood v. Buffalo R. R. Co.*, 12 How. Pr. 136. *Catlin v. Doughty*, *id.* 457. *Teller v. Randall*, 40 Barb. 242. *Corning v. Tooker*, 5 How. Pr. 16. *Goodyear v. Betts*, 7 *id.* 187. *Crownæ v. Whipple*, 34 *id.* 333.) These cases are all in point, and have never been overruled. Section 299 is a wise provision, and becomes necessary, in a case like this, for the protection of a third party who may have purchased a chattel. Suppose there are a dozen creditors of the defendant Hugh McGuire; he has sold his mortgage, and his wife, Bridget, has become a *bona fide* holder and owner for value, but all these creditors wish to test the validity of her title. If the plaintiff can maintain this action, then each of the creditors can do the same, and there would be a dozen suits against Bridget, involving her in a great mass of troublesome and expensive litigation. It has been the intention of the law makers to protect parties and relieve them from troublesome and vexatious law suits, and such was the intention of section 299. It has been settled that there can be but one receiver. He is a trustee for all the creditors, in their order, and any question as to the validity of a transfer must necessarily be settled by one suit, and for the benefit of all the creditors. If this action can be maintained in the name of the judgment creditors, it in fact gives the creditor the right to try the question twice. If he was beaten upon this trial he could bring another action in the name of a receiver appointed in said proceeding. A receiver can bring an action like this, (*Seymour v. Wilson*, 15 How. 355; 10 Abb. 197,) and this action would be no bar. The legislature saw the danger of this, and adopted section 299 to apply in a case like this; and where will it apply if not in this case? In the case of

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Edmonston v. McLoud, (*supra*.) Welles, J., says, "that these provisions of the Code, in relation to proceedings supplementary to execution, were intended to be complete, and to afford a judgment creditor instituting proceedings under them the full benefit, and to put him in possession of all his rights," &c. And again he says, in the same case, "An action by the receiver would be in substance a continuation of the proceedings, or at least the carrying out of these proceedings under the provisions of the Code." The counsel for the plaintiff admits that if a receiver had been appointed in said proceeding, then the action should have been brought in the name of such receiver. It does not appear whether there was or was not a receiver appointed, and this court cannot presume that there was not a receiver, any more than that there was. Again, the counsel for the plaintiff urges that the former creditor's suit was not repealed by the Code. This may be so. The creditor may still have that right of action to remove any obstruction between him and the debtor's property, on the return of an execution unsatisfied; but the practice is well settled that where a party places himself under the provisions of the Code, and there attempts to recover his rights, he is estopped from abandoning them and going back to some other form and practice. But as to this question, BOCKES, J. says, in 20 *Barb.* 383, "Section 299 of the Code applies to those cases only where proceedings supplementary to execution have been instituted under chapter 2, title 9 thereof." (*Goodyear v. Betts*, 7 *How. Pr.* 187.) MILLER, J., in the case of *Teller v. Randall*, (40 *Barb.* 242;) Denio, Ch. J., in the case of *Locke v. Mabbett*, (2 *Keyes*, 461,) and MILLER, J., in the case of *Crounse v. Whipple*, (34 *How. Pr.* 333,) all say that where property is discovered, upon the examination in proceeding supplementary to execution, in the hands of some person who claims to own it, the proper course to be pursued is to appoint a receiver and

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bring an action in the name of the receiver to test the validity of the claim.

There is no authority in the books that holds that a creditor can bring this action at any time before the receiver is appointed, which seems to be the theory of the counsel for the plaintiff. But all the decisions that bear on this question are to the effect that where proceedings supplementary to execution are commenced, then the action, like this, should be in the name of a receiver.

The Supreme Court will not interfere in this matter. The plaintiff has a proceeding pending in the county court, in which all these defendants are parties, for the same subject matter. I think the law will not permit the plaintiff to proceed in both the county and Supreme Court at the same time. He must elect which he will proceed in; and having chosen the proceeding supplementary to execution, in the county court, which is ample to recover all his rights, he must proceed therein; and this court will not take cognizance of the matter until he has exhausted his remedy there, and only then in an action in the name of a receiver. It is not necessary to have the aid of this court until after a receiver is appointed. When there is some obstruction between such receiver and the debtor's property, which can only be removed by an action, the proceeding in the county court is in the nature of a bar to this action.

It is submitted that the learned judge did not properly consider this question when presented, and that this court will, as in the case of *Edmonston v. McLoud*, (19 Barb. 357,) grant the nonsuit asked for, and order judgment absolutely for the defendants.

II. The court erred in allowing the plaintiff to testify and give evidence against Armstrong and Bridget McGuire. It was alleged in the complaint, and denied in the answer, that Hugh McGuire was insolvent. It became necessary for the plaintiff to prove this, as against

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Armstrong and Bridget, or Bridget's title would be valid. If Hugh was solvent on the day when he assigned the mortgage—and the presumption is that he was—then the plaintiff's claim was good, and he was not injured by the assignment being made, and the plaintiff would have no right of action against either Armstrong or Bridget. The question calls for what Hugh said when being examined, six weeks after making the assignment, and when not in the presence of either of the defendants. Anything that Hugh said subsequent to the time of making the assignment would not be competent against the assignee, for the purpose of impeaching and declaring void the assignee's title. It would not be competent even if the assignee was present; for how could the assignee be responsible, or affected by what the assignor might say after the transaction was completed. But Armstrong and Bridget were not present, and what he said is not admissible. (*Gillespie v. Walker*, 56 Barb. 185.) It was not the best evidence. The best evidence would be from Hugh. He should have been called upon, and asked what property he had on the day he assigned the mortgage; and then the inquiry should have been confined to the time when the assignment was made, because he might have been solvent on that day, and the plaintiff's claim abundantly good, independent of the mortgage, and became insolvent by the time he was speaking, or even before any judgment was obtained against him. If such was the case, it was not a fraudulent transaction against the plaintiff. It was not the best evidence; it was hearsay and secondary. If the examination of Hugh, referred to, had been produced and offered, it would not be admissible against Armstrong or Bridget. (*Gillespie v. Walker*, *supra*.) Bridget is the only party in interest; she is defending her title. Hugh and Armstrong have but little interest, except to save themselves from costs. She has purchased the mortgage and paid for it, and has a right to insist on a strict

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adherence to the rule. The declarations of an assignor, made long subsequent to the assignment, and when not in the presence of the assignee, should not be admitted for the purpose of taking away the assignee's title. All the evidence given by the plaintiff was improper; and for this error the judgment should be reversed.

III. The court erred in denying the motion for a non-suit, and also in finding and reporting that the assignments were made for the purpose of hindering, delaying and defrauding the plaintiff in the collection of his debt. It is well settled that a fraud cannot be presumed; it must be proved. There is no evidence which will sustain a court or jury in finding that there was a fraud in this transaction. John Burke and wife gave to Hugh McGuire a bond and mortgage, and Hugh assigned the same to Martin Armstrong, and Armstrong assigned to Bridget. There was only a consideration of one dollar mentioned, but that does not make it a fraud on its face. If there had been no consideration mentioned, it would be a valid assignment, because it is under seal. It was not admitted that only a consideration of one dollar was paid, but that is the amount expressed in its face. The assignee paid full value for the mortgage, but for some cause the assignment was thus drawn. It is a common occurrence to so draw an assignment, or even to draw one without mentioning any consideration. It is not shown that either Armstrong or Bridget knew that Hugh was insolvent, or that he owed any debts, or that they did not pay the full value of the mortgage. There is no evidence of the value of the mortgage. There is no evidence of fraud. The burden of showing all this was upon the plaintiff, and it must be shown in order to maintain the action. Fraud in a conveyance will not be inferred from the want of consideration; but the burden of proving the intent is upon the creditor who impeaches the conveyance. (*Loeschigk v. Hatfield*, 5 Robt. 26. *Auburn Exch. Bank v.*

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Fitch, 48 Barb. 344. *Holmes v. Clark*, Id. 237. *Dygert v. Remerschnider*, 32 N. Y. 629. *Carpenter v. Muren*, 42 Barb. 300. *Waterbury v. Sturtevant*, 18 Wend. 353-365. *Baker v. Gilman*, 52 Barb. 26. 18 Wend. 553. 1 Barb. Ch. 220.) There was no judgment against Hugh when he made the assignment, and it is not shown that he was insolvent, or anything by which Armstrong or Bridget should have been put on their guard. Hugh then had a right to sell his property and give such an assignment as the purchaser desired.

Batcheller & Hill, for the respondent.

I. The action was properly brought in the name of the plaintiff, no receiver having been appointed. (*Catlin v. Doughty*, 12 How. 428. *Hammond v. Hudson Riv. Iron Co.* 20 Barb. 378.)

II. The fraudulent intention of all the defendants was fully shown. The defendants Armstrong and Bridget, receiving the transfers of the bond and mortgage in question, without actually paying, securing or becoming bound to pay any consideration therefor, they are presumed to have knowledge of the fraudulent intent of the defendant Hugh. (*Wood v. Hunt*, 38 Barb. 302. *Newman v. Cordell*, 43 id. 448.) There being no denial of the fraudulent intention of the defendants, by them on the trial, when they had an opportunity to deny, the plaintiff's presumptive evidence of such intention thereby becomes conclusive. The transfers of the bond and mortgage was but the gift of an insolvent party to his wife, leaving his debts unpaid.

IV. The plaintiff's evidence of Hugh's statements in the supplementary proceedings was properly received. Where fraud against creditors is alleged, the declarations of the debtor and all others concerned in the fraud are admissible. (*Woodhouse v. Jones*, 5 N. Y. Leg. Obs. 20.) The same principle does not apply to this case that applies in the case of a bona fide transfer of a demand for a valuable consideration, without fraud.

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By the Court, MILLER, P. J. This action was brought by a judgment creditor of the defendant Hugh McGuire, to set aside an assignment of a bond and mortgage belonging to said defendant McGuire, and by him assigned to the defendant Armstrong, and by said Armstrong assigned to the wife of McGuire, who is also made a defendant. It is based upon the ground that the assignment was without consideration, and was fraudulent and void as to the plaintiff.

It is insisted by the defendants' counsel that the action should have been brought in the name of a receiver, under section 299 of the Code, and not in the name of a judgment creditor; and that the court erred in denying the motion made for a nonsuit upon this ground. While it is not denied that a creditor may maintain such an action on the return of an execution unsatisfied, it is claimed that where a party institutes proceedings under the provisions of the Code, he is estopped from abandoning them and bringing an action individually, and can only proceed through the instrumentality of a receiver appointed under the proceedings. Conceding that this may be the case where a receiver has been actually appointed, I think that such is not the rule in all cases. The authorities hold that where it appears in proceedings supplementary to execution, that property of a judgment debtor is in the hands of a third person, who claims title, the judge cannot try the question of title summarily, but a receiver must be appointed to bring an action for that purpose. (*Rodman v. Henry*, 17 N. Y. 484. *Teller v. Randall*, 40 Barb. 242.) So also an action to recover a debt due the judgment debtor from a third person must be brought by a receiver appointed under the provisions of the Code. (*Sherwood v. Buffalo R. R. Co.*, 12 How. Pr. 136. *Edmonston v. McLoud*, 19 Barb. 357. *Crounse v. Whipple*, 34 How. 333.) The doctrine held in these cases is not in the way of an action in the nature of a creditor's bill for the purpose of having

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an assignment or other disposition of property by a judgment debtor declared fraudulent and the property applied to the satisfaction of the judgment. (*See Goodyear v. Betts*, 7 How. 187.) The right of a judgment creditor to maintain an action of the character of the one at bar has been repeatedly held. In *Catlin v. Doughty*, (12 How. 457,) it was decided that the former action by judgment creditor's bill is still in force, and may be resorted to after execution returned unsatisfied in whole or in part. In *Gere v. Dibble*, (17 How. 31,) it was held that a creditor's suit can be maintained by judgment creditors on their own account, *after a receiver has been appointed* in supplementary proceedings, to set aside as fraudulent, and declare void, a mortgage previously given by the judgment debtor, upon his real estate, &c., where the judgments were a lien prior to the appointment of a receiver. In *Hammond v. The Hudson River Iron and Machine Co.*, (20 Barb. 378,) it was held that an action will lie to reach property and effects in the hands of parties who, it is alleged, have fraudulently received the same from the judgment debtors, and unjustly assert a claim thereto against the plaintiff's judgment and execution. The remark of the learned judge who wrote the opinion in the last case cited—that the Code applies to those cases only where proceedings have been instituted—upon which some stress is laid, is undoubtedly true, and applies where a receiver has been appointed; and although it has been held that a receiver can maintain an action to set aside a fraudulent assignment, (*Porter v. Williams*, 5 Seld. 148,) yet, as was said in *Gere v. Dibble*, (*supra*), "it was not decided that a judgment creditor could not, after the appointment of the receiver;" certainly not, that no action could be maintained where a receiver had not been appointed, as is the fact in the case at bar.

It is plain, I think, that the action was properly brought

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in the plaintiff's name, and there is no force in the objection taken.

The court committed no error in holding that the assignments were made for the purpose of hindering, delaying and defrauding the plaintiff in the collection of his debt. It appeared that the defendants Armstrong and Bridget McGuire, the wife of the judgment debtor, received the transfers of the bond and mortgage in question upon the same day, without paying or securing, or becoming liable to pay, therefor, any consideration whatever. These were circumstances in connection with the fact that the transfer was formally passed to the wife, and that there was no proof to rebut the presumption of fraudulent intention, when the defendants had full opportunity to present it, from which a fraudulent intent might be presumed; and it might fairly be inferred by the judge, from the facts and circumstances, that Armstrong and the judgment debtor's wife had full knowledge of the fraudulent intent to prevent the creditor from collecting his demand. (*Wood v. Hunt*, 38 Barb. 302. *Newman v. Cordell*, 43 id. 448.) It was quite evident that the bond and mortgage was a gift from the judgment debtor to his wife, after he had become insolvent, and while he had debts unpaid; and the evidence presented a question of fact as to the intent, from which only one inference could be drawn by the court. Even if it be conceded that in some cases fraud will not be inferred from the want of consideration alone, yet the question of fraudulent intent is a question of fact. (*Dygert v. Remerschnider*, 32 N. Y. 629.) And where there is sufficient evidence to sustain the finding, it cannot be disturbed.

I think that the court properly refused to nonsuit as to the defendant Armstrong. Armstrong took the assignment of the bond and mortgage, and thereby made himself a party to its fraudulent transfer. It was quite as essential to set it aside as to him as it was to annul the assignment

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made by him to the wife of the judgment debtor. Both the assignments were obstacles in the way of collecting the plaintiff's demand, and all of the defendants had participated in creating them; and therefore Armstrong was properly held as a party to the action.

It is also objected that the court erred upon the trial in admitting evidence of Hugh McGuire's testimony taken upon his examination in proceedings supplementary to execution upon the plaintiff's judgment.

I think the judge erred in the admission of this testimony. In *Gillespie v. Walker*, (56 Barb. 185,) it was held, in a case bearing a striking similarity to the one now considered, that the examination of the husband was competent evidence against the husband only, and not against the wife. The distinct objection was taken on the trial, in the case at bar, that it was inadmissible for any purpose, against Armstrong and Bridget McGuire, and the testimony admitted generally, without any restriction as to its effect. The testimony therefore may have had an effect upon the mind of the judge, as to these defendants; and where such is the case the judgment cannot stand. That such evidence is inadmissible was also held in *Cuyler v. McCartney*, (40 N. Y. 221.) It was not competent as declarations made in execution of a common purpose to defraud, as it was only an examination of the defendant in a legal proceeding.

The appointment of a receiver by the judge was in accordance with the settled practice in such cases, and not erroneous.

Although the case was properly tried in other respects, the admission of the improper evidence referred to was a fatal error, and the judgment must be reversed, and a new trial granted, with costs to abide the event.

New trial granted.

THE PEOPLE, *ex rel.* The Board of Supervisors of Kings County, *vs.* THE COMMISSIONERS OF PROSPECT PARK IN THE CITY OF BROOKLYN.

By an act of the legislature, land was set apart "as a parade ground for the county of Kings," and declared to be a "public place." Provision was made for acquiring the title thereto by the Commissioners of Prospect Park in the city of Brooklyn, and for assessing the damages of the owners; and it was declared that the lands, when taken, should be the property of said county, "as and for a parade ground," but should be under the exclusive charge and management of such commissioners "for the purposes of police and improvement as such parade ground."

Held, 1. That it was the intention of the statute that the grounds should be acquired, not merely for a public place and parade for the use of Kings county, but for the general purpose of military parades.

2. That the provision of the statute placing the land under the exclusive charge and management of the commissioners of Prospect Park, "for the purposes of police and improvement as such parade ground," so far restricted the general sense and meaning of the terms "public place" and "parade ground," as to render the public use of the ground as a parade ground subject to the police regulations which might be properly adopted by the commissioners.

3. That within the lawful exercise of that authority, the commissioners might exclude from the ground such military organizations as in their judgment could not be safely intrusted with its use and enjoyment.

4. That under the authority to establish rules and regulations for police and improvement, the commissioners were invested with a sound discretion as to the military organizations which could be safely and judiciously intrusted with the use of the grounds; leaving them at liberty, in the discreet exercise of their powers, to admit such as would properly use, without abusing, the grounds, and to exclude from them such as they might believe could not be safely or prudently admitted to the enjoyment and use of them, without endangering their condition, or disturbing the good order and security of the neighboring inhabitants.

5. That if this discretion should be improperly made use of, or be perversely abused, the remedy for its correction was not by means of the writ of *mandamus*, but by direct measures for the removal of the commissioners, or for punishing them, in case they should intentionally and willfully omit to discharge the duties imposed upon them by law.

THE relator, upon an affidavit and notice, applied to a special term of this court held at the city of Brooklyn, for a peremptory *mandamus* directing the defendants to

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exclude from the parade ground of the county of Kings, all organizations existing outside of that county, and to confine and limit its military use to the organized national guard of that county. In support of the application it was shown that the commissioners had consented to allow such grounds, during the present and the next ensuing years, to be used by the national guard of the city of New York, comprising the whole of four brigades, and that it would be so used unless prevented by operation of law. It was also shown that the parade ground was acquired by the county of Kings under chapter 852 of the laws of 1866; and that the supervisors of that county had, by resolution, directed that such ground ought not to be used by military organizations outside of the county, and that the law committee take measures for preventing the use of such grounds by military organizations outside of Kings county. The mandamus was ordered by the court, and from the order awarding it the commissioners appealed.

Joshua M. Van Cott, for the appellants.

Phillip S. Crooke, for the respondent.

By the Court, DANIELS, J. By the express language of section seven of the act under which the parade ground in controversy was acquired, it became, upon its acquisition, the property of the county of Kings. And by section one of the same act, the title was vested in that body, as a parade ground for that county. But nothing beyond that, and the fact that it was to be paid for by that county, was inserted in the act, from which it could be presumed to have been intended that the use of the ground should be exclusively appropriated to the military organizations of that county. It could very well be the property of that county, and a parade ground for it, without being confined to the use of its own military organizations. Whether it

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should be so used, or could be used in common by such organizations, and those of other counties, it would still, without impropriety, be designated as a parade ground for the county of Kings. For as long as it was to be paid for by it, and the title was to become vested in it, the ground was strictly and literally a parade ground for that county, when it was afterwards acquired under the provisions of the statute. The terms made use of may be as appropriately satisfied by confining them to this signification as the sense of similar terms may be, when used for the designation of the streets, squares, parks and other public grounds acquired, laid out and preserved for the respective cities and villages of the State. They are, strictly speaking, the streets and grounds of the city or village in which they may be situated. But nevertheless, from their nature and objects, they may still be used by all persons having occasion for such use, whether they are residents or citizens of the municipality maintaining them, or not. The right to make such use of them results from the circumstance that they are created for the enjoyment of that use. They are for the convenience, recreation and benefit of the public; and every member of it, appropriately using them for those purposes, is legally entitled to do so. In this respect the act referred to does not materially differ from other statutes providing for the creation and maintenance of public grounds. For while the ground in controversy was to be, and was, acquired for a parade ground, and from its nature should be exclusively devoted to that object, there is still nothing in the act requiring that the military organizations existing outside the county of Kings should be perpetually excluded from its use and enjoyment. On the contrary, the first section of that act declares that the parade ground, although procured for the county of Kings, should be a public place, and the seventh section, with nearly equal explicitness, provides that it shall be the property of the county for a parade ground; not that it shall

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be a public place, and a parade ground, for the exclusive use of the military organizations of the county, but for such uses as the popular signification of those terms may be fairly and reasonably understood as including. For as those words have acquired no legal signification differing from that popularly given to them, it must be presumed that they were used in that sense by the legislature, in the present instance. And if they were, then their plain import would appear to indicate that the grounds were intended to be acquired for the general purposes of military parades. The object of acquiring them must have been the promotion of the efficiency and discipline of the military organizations of the State, so far as they might prove to be conveniently accessible to them. This is fairly disclosed by the provisions already referred to, by which the land is declared to be a public place and a parade ground; not a public place and parade ground for the mere use of Kings county, but according to the fair meaning and import of those words; for they were made use of in a general sense, and without the disclosure of any purpose or design to limit or restrict their signification beyond that to be derived from the circumstance that the ground was to be under the exclusive charge and management of the Prospect Park commissioners for the purposes of police, as such parade ground.

This provision so far restricts the general sense and meaning of those terms as to render the public use of the ground as a parade ground subject to the police regulations which may be properly adopted by the commissioners. And within the lawful exercise of that authority they may exclude from it such military organizations as in their judgment could not be safely intrusted with its use and enjoyment. For, by that authority, they have been empowered to adopt and ordain such reasonable, prudential and wholesome regulations and ordinances as they may judge to be necessary or expedient for the protection

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and preservation of the grounds subjected to their government, to maintain decorum and good order and promote the objects designed to be accomplished in acquiring them. This is the nature and character of a police power. (*Com. v. Alger*, 7 *Cush.* 53, 85, 86.) And by section 7 of the act referred to, that power was delegated to these commissioners over the land appropriated to the creation of this parade ground.

Under this authority the commissioners were invested with a sound discretion as to the military organizations which could be safely and judiciously intrusted with the use of these grounds. Leaving them at liberty, under the discreet exercise of their powers, to admit such as would properly use without abusing the grounds, and to exclude from them such as they might believe could not be safely or prudently admitted to the enjoyment and use of them, without endangering their condition, or disturbing the good order and security of the neighboring inhabitants.

If this discretion should be improperly made use of, or be perversely abused, the remedy for its correction is not by means of the writ of *mandamus*, which is strictly confined to the enforcement or protection of rights not dependent upon the use of discretionary authority, but by direct measures for the removal of the commissioners, or for punishing them, in case they should intentionally and willfully omit to discharge the duties imposed by law upon them. No reason exists, in the present instance, for supposing that either of those remedies even will ever become necessary for the protection of this property, or of the public. But if they should, the writ of *mandamus* will afford no means by which they can be enforced.

The order appealed from should be reversed, with costs, and an order entered denying the motion made by the relator.

[SECOND DEPARTMENT, GENERAL TERM, at Poughkeepsie, June 14, 1870.
J. F. Barnard, P. J., and *E. D. Smith* and *Daniels*, Justices.]

JACOB STINER and others vs. JOSEPH STINER and others.

The only ground upon which it can be held that a party obtaining a conveyance or lease of land may be compelled to hold the same as trustee for another, is where such party stood in a confidential relation to the other and has used such relation to his own advantage.

Where no fraud is shown, in fact, and no relation exists between the parties in which either owes a duty to the other, and no breach of trust or confidence is shown, whatever advantage one may gain over the other by a sharp bargain, or an over-bidding against him, cannot be interfered with.

If a fraud is practiced upon a landlord, by one desirous of obtaining a lease of premises from him, the lessor may in equity set aside the contract; but no such right accrues to another person from the fact that he also was desirous of obtaining a lease of the same premises, and had applied for one, but had made no agreement therefor, and that the other obtained the same by taking advantage of the lessor's mistaking the lessee for him.

Under such circumstances, the party obtaining the lease owes the other no duty, and the latter has acquired no right to a lease; and between them there is no relation of confidence which can create the obligations that arise from a trust. Hence there is no principle of equity which will allow the court to adjudge the lessee to stand in the relation of trustee to him; even though in negotiating for such lease, the lessee concealed the fact that he did not represent the other party, with whom the lessor supposed himself to be dealing. *CARDOZO, J., dissented.*

Where, in an action against a lessee, for fraud in obtaining a lease, which the plaintiffs were anxious to procure for themselves, the finding of the court, upon conflicting evidence, was that the defendant did not intentionally or fraudulently divert the lease from the plaintiffs; nor did he know, prior to its execution, that the lessor meant it to be a lease to the plaintiffs; nor did he in any way fraudulently suppress the truth, in the premises; *Held* that this finding was conclusive upon the question of fraud.

A PPEAL from a judgment ordered at a special term, in equity, dismissing the complaint, with costs.

The complaint, in substance, avers that the plaintiffs are partners, in the city of New York, as dealers in teas and coffees, under the firm name of "J. Stiner & Co.," and that they conduct their business under the style of the "New York and China Tea Company," their principal warehouse being at No. 49 Vesey street, in said city. That the defendant Joseph Stiner is proprietor of various branch stores in said city, his principal warehouse being at No. 51

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Vesey street, called "Joseph Stiner's Vesey Street Tea Warehouse." The complaint also avers that the defendants Wm. E. Hasbrouck and Thomas H. Roe, had power, as agents for the owners thereof, to lease the store No. 204 Greenwich street; that the plaintiffs applied to them at Newburg, for a lease thereof, about January 24, 1868, at the same time delivering to them their business card, describing their firm as "J. Stiner & Co.," No. 49 Vesey street. That these agents said they had not determined whether they would lease said premises to any person other than the then occupant thereof, one Worley, but would call on the plaintiffs during the following week, and let them know. That the said agents did, in pursuance of said promise, visit said city, and by mistake entered the store of the defendant Joseph Stiner, adjoining, who, falsely and fraudulently keeping them under the impression that they were dealing with the plaintiffs, persuaded the owners of said store, No. 204 Greenwich street, to give to the said Joseph Stiner a lease thereof for the term of five years, from May 1, 1868. The complaint also avers, that in obtaining this he falsely, fraudulently and maliciously personated and assumed to act for the plaintiffs' said firm; that the delivery to him of said lease was the result of error and mistake on the part of the lessors; that the good will of said lease is worth some \$10,000. The prayer of the complaint is, either that the said lease be declared to have been executed for the benefit of the plaintiffs, and that it be assigned to them, or that it be canceled, and another and similar lease be executed to the plaintiffs.

The answer of Joseph Stiner expressly denies all knowledge of any prior negotiation for a lease of said store, by or on behalf of the plaintiffs; utterly denies that he personated or assumed to act for them, and avers that it was obtained by him in good faith, and without knowledge of any claim or pretended claim of the plaintiffs thereto.

The answers of the other defendants make substantially

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the same averments, with others which it is unnecessary particularly to refer to.

The action was tried at a special term, before a justice of this court, without a jury, as an equity cause, in March, 1869.

The following facts were found by said justice.

First. That the defendant, Joseph Stiner, prior to May, 1860, carried on the business of buying and selling teas, coffees and sugars, in the city of New York, and during that month took Jacob Stiner, one of the plaintiffs, in business as a partner with him, when the firm name became "J. Stiner & Co.," and after the subsequent introduction of Philip Stiner into the business, the firm continued until January, 1867, when they dissolved their business connections, Joseph retiring from the firm; the stock in trade, fixtures and stores, several in number, were divided between them, the plaintiff Jacob retaining the stores 47 and 49 Vesey street.

Second. That after the dissolution the defendant Joseph purchased the lease and good will of the store 51 Vesey street, with the fixtures, for the purpose of carrying on the same kind of business which he has continued there, and at his seventeen other stores in the city hitherto.

Third. That at the time of the commencement of this action, the plaintiffs were partners in business as dealers in teas, coffees and sugars, under the name and firm of "J. Stiner & Co.," and that their principal warehouse, from the time aforesaid until the present time, has been at No. 49 Vesey street aforesaid.

Fourth. That at the time of said dissolution there was no understanding or agreement between the parties to such dissolution, that Joseph should not set up a store in the vicinity of, or in opposition to, the plaintiffs.

Fifth. That the store No. 204 Greenwich street, being the one in controversy, and forming the southwest corner of Greenwich and Vesey streets, and being a desirable

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location for the business, was sought after by both parties; the defendant Joseph, during the latter part of the year 1867, endeavoring to discover the owner; that he searched the tax books, where they were assessed to Poe, instead of to Roe, the real owner, and Joseph was unable to procure a lease until after the 29th January, 1868, on which day he learned who the owners were.

Sixth. That prior to the 29th day of January, 1868, the plaintiffs also had made some exertions to ascertain the names of the owners of the premises No. 204 Greenwich street aforesaid, and upon learning their names and residence, Mr. Moses, one of the plaintiffs, on or about the 29th day of January, 1868, went to Newburg, where the lessors and their agents resided, and saw Mr. William C. Hasbrouck, one of the defendants, who referred him to Mr. Roe; that he inquired of them, separately, who were the owners of said premises, and whether they could lease the same from May 1, 1868, said Moses saying "J. Stiner & Co.," No. 49 Vesey street, New York city, were desirous of leasing the same for a tea store for a term of years from May 1, 1868, and if said "J. Stiner & Co." could obtain such lease, they would pay a liberal rent for said premises, and make improvements thereon at their own cost and expense, the same being greatly dilapidated and in need of extensive repairs and improvements; that such agents, Roe and Hasbrouck, separately informed Moses that they could not enter into any negotiation for the lease of said premises to any person without first seeing Mr. Worley, the then tenant of said premises, and offering him a new lease thereof; that they would probably be in New York city on or before the 1st day of February, 1868, about leasing said premises, and would then try and call upon "J. Stiner & Co." about the matter; that Moses left J. Stiner & Co.'s card with Mr. Roe; that he did not apply for a lease for any definite term; that no rent was mentioned nor agreed upon; that no sum was mentioned as

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the amount of improvements; that no note or memorandum in writing of any kind or nature was made or signed; that neither Roe nor Hasbrouck promised in any way or manner, when Mr. Moses was at Newburg, to let the store to the plaintiffs if they concluded not to rent it to the tenant Worley.

Seventh. That Messrs. Roe and Hasbrouck, who were the duly authorized agents to rent said premises, on the 29th day of January, 1868, left Newburg and came to the city of New York, for the purpose of negotiating, on behalf of the owners of said premises, a lease thereof from May 1, 1868; that they first called at No. 204 Greenwich street aforesaid, to see Mr. Worley, the then tenant, and to give him an opportunity of re-leasing them, and not finding him there, went immediately thence to call at No. 49 Vesey street aforesaid, to see said J. Stiner & Co. about negotiating a lease of said premises; that by mistake they went into No. 51 Vesey street (Joseph's store) instead of into store No. 49, belonging to the plaintiffs; Joseph's store, No. 51, is west of the plaintiffs', and between it and No. 204 Greenwich street; that Roe and Hasbrouck, instead of passing No. 51, went into it, intending to go into No. 49, although 51 had painted upon it, in large letters, in several places, "Joseph Stiner;" that, being thus in No. 51, they inquired of a clerk therein, for Mr. Stiner, and they were told he was not there, but was at his store No. 6 Fulton street; that they went there, and inquired for Mr. Stiner, and were introduced to the defendant Joseph; they told him they had come from Newburg that day for the purpose of negotiating a lease of No. 204 Greenwich street; that they had that day previously called at No. 204 Greenwich street, to see the then tenant, Mr. Worley, and give him the opportunity of taking a new lease thereof from the 1st of May, 1868, and had not been able to see said Worley; that they then informed Joseph that at Newburg, some few days before January 29, 1868,

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they had been applied to for a lease of said premises for a tea store; that thereupon they told Joseph that he was not the person who had called on them, at Newburg, and he replied that he was not; that he carried on business on his own account, but that he knew the premises, and wanted to lease the same for a tea store; that they, supposing and believing said Joseph Stiner was the person, or one of the persons, on whose behalf said Moses had applied to them, as aforesaid, and having ascertained upon inquiry that he was a responsible man, and would make a good tenant, they informed him they would lease said premises to him for the time and on the terms contained in the lease dated January 31, 1868, subsequently made by the owners of said premises to him, but before consummating said lease they would make further efforts to see said Worley, and give him an opportunity of re-leasing said premises; that Joseph Stiner assented to take a lease of said premises for the time and on the terms and conditions above mentioned; and that it was then and there agreed, between said Joseph and Roe and Hasbrouck, that the latter should have till three o'clock in the afternoon of January 29, 1868, to make further efforts to see said Worley, and, if possible, give him an opportunity of re-leasing said premises; that Roe and Hasbrouck thereupon made every possible effort to find said Worley before three o'clock in the afternoon of the last mentioned day, without success, and at that time advised said Joseph Stiner that he could have a lease of said premises for the term and on the conditions proposed; that accordingly said lease to him, dated as aforesaid, between the owners of said premises as lessors, and him as lessee, in duplicate, was duly executed, stamped, and delivered on the said 31st day of January, 1868, Joseph Stiner having come to Newburg for the purpose of obtaining said lease.

Eighth. That the lease in question was executed and delivered to said Joseph Stiner under the impression and

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belief, on the part of the landlords, (resulting solely from the mistake on their part in going into No. 51 instead of into No. 49,) that it was to and for the benefit of the person or persons on whose behalf Mr. Moses had called on them at Newburg, and that the contrary was not discovered by the landlords, or their agents, until some time thereafter, and then through the instrumentality of the plaintiffs; that when the said mistake was so discovered, Roe and Hasbrouck, believing that but for such mistake the lessors probably would have made a lease to the plaintiffs similar in all respects to the one given to Joseph, expressed to the plaintiffs a willingness on the part of the owners, if Joseph would surrender said lease, to execute and deliver a similar one to the plaintiffs, but said owners and agents at the same time and ever since have claimed that the owners were never legally nor honorably bound to execute and deliver to the plaintiffs such a lease, or any lease whatever, of said premises; and that they were, and always have been unwilling, by their acts, to annul, or to claim legally a cancellation of the said lease; and that the said owners and lessors, and their said agents, after the mistake aforesaid was discovered, and with full knowledge thereof, and before the commencement of this action, in all things ratified and confirmed the said lease to Joseph, and always have been and are now unwilling to annul or cancel the same; that they have received the rent from Joseph, and have in all respects recognized him as their tenant, refusing to receive rent for the said premises from the plaintiffs, and refusing to recognize them in any way or manner, always claiming and insisting that the same was a valid and binding lease between the parties thereto, and in no way tainted by fraud.

Ninth. That there is not the slightest personal resemblance between Mr. Moses and the defendant Joseph Stiner, and it is impossible, with ordinary attention, to mistake the one for the other; that the agents for the

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landlords aforesaid, when they came to New York, January 29, 1868, were personally unacquainted with the defendant Joseph, never having seen him before that day, and knew none of the plaintiffs except Mr. Moses; that at the time of negotiating for and accepting the lease in question, Joseph Stiner was wholly ignorant of the fact that Mr. Moses had been to Newburg, or that the plaintiffs had in any way been in treaty for the store, or that Roe and Hasbrouck were in pursuit of the plaintiffs or of any of them; that Roe and Hasbrouck gave him no such information; that Joseph, never in any way or manner, personated the plaintiffs, or any of them; that he never in any way or manner assumed to act for the plaintiffs or on their behalf, or in their interest; that he neither said nor did anything at any time to induce the landlords or their agents to suppose or believe that he was one of the plaintiffs, or that he could do the business for them, or that he was the person or one of the persons on whose behalf Mr. Moses had called at Newburg; that Joseph was not guilty of any fraud whatever, either upon the landlords or the plaintiffs, in negotiating and accepting the lease in question; that he did not mean to perpetrate any fraud whatever; that he did not know Roe and Hasbrouck were in pursuit of a Mr. Stiner, who wanted the premises for a tea store; that he did not know that Roe and Hasbrouck were in pursuit of the plaintiffs or any of them; that Joseph did not, by act or word, lead Roe or Hasbrouck into the belief that he was one of the plaintiffs, or that the negotiations with them for the lease would enure to, or was for the benefit of, the plaintiffs; that he was and is in the habit of hiring many stores in his business; that he were at this time frequently called upon by persons having property to rent, and that he hired the store in controversy in the usual and customary way.

Tenth. That Joseph did not intentionally or fraudulently divert the lease from the plaintiffs, or prevent its being

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executed to them; nor did he at any time know, prior to its execution, that the landlords meant or understood it to be a lease to the plaintiffs, nor did he in any way or manner fraudulently or otherwise suppress the truth in the premises.

Eleventh. That Mr. Roe, in the interview with Mr. Moses on January 24, 1868, was not in any way given to understand that the plaintiffs were willing to make terms with the landlords as favorable to the latter as could be obtained from any other applicants or tenants.

Twelfth. That on or about February 24, 1868, the plaintiffs requested from Joseph Stiner, in writing, a surrender of the lease in question, which he refused to make, by treating it with silent contempt; that the plaintiffs' offers to indemnify him against the lease were made in good faith, and that their responsibility for the performance of these offers is ample; that the plaintiffs first ascertained that Joseph had the lease in question about the middle of February, 1868.

Thirteenth. That the landlords have at all times been unwilling, by any act of theirs, to annul or cancel the lease in question, insisting before the commencement of this action, and ever since, that they were never legally or otherwise bound to execute a lease to the plaintiffs, and that the lease was a valid and binding one, without fraud; that the agents aforesaid, after the mistake was discovered, expressed, on behalf of the owners, a willingness on their part, if Joseph would surrender said lease, to execute a similar one to the plaintiffs, but the expression of such willingness on their part was accompanied by an express declaration that they were never legally bound to execute a similar or any lease whatever to the plaintiffs, and that they were unwilling by their act to annul or to claim legally a cancellation of the lease; that the owners have always insisted that the lease was a valid and binding one, throwing the responsibility of cancelling and surrender-

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ing the same upon Joseph, and always refusing to annul or cancel the same by any act of theirs.

Upon these facts, the conclusions of law were as follows:

1st. That no valid or binding agreement for a lease was ever made between the plaintiffs and the owners, or their agents.

2d. That what was said and done at Newburg did not amount to an agreement for a lease, nor to a lease of the premises; because no rent, nor term, nor conditions, were definitely or clearly stated, ascertained, or agreed upon.

3d. That Joseph, in negotiating and accepting the lease in question, acted solely on his own account, and on his own behalf, and not as the agent or trustee of the plaintiffs, and was not guilty of any fraudulent representation, concealment, or conduct whatever.

4th. That the mistake of the owners cannot be taken advantage of by the plaintiffs.

5th. That the refusal of the owners to cancel or annul the lease after discovering the mistake, operates as a ratification and confirmation thereof.

6th. That before and since the commencement of this action, the lease was in all things ratified and confirmed by the lessors, as a valid and binding lease between them and the defendant Joseph.

7th. That at the time of the execution and delivery thereof, the said lease was, and ever since has continued be, a valid and binding contract between the parties thereto, and that the plaintiffs never had any right, title, or interest in or to the same, or in or to the lease created thereby.

8th. That the defendants are entitled to judgment upon the whole case in their favor.

9th. That the defendant Joseph Stiner is entitled to his costs and disbursements in this action, as against the plaintiffs, to be taxed.

10th. That the other defendants are entitled to their

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costs and disbursements, as against the plaintiffs, to be taxed.

11th. That judgment be entered against the plaintiffs, and in favor of the defendants, accordingly.

The plaintiffs excepted to the findings of fact and law in this action, and appealed from the judgment entered upon such findings.

John Graham, for the appellants.

I. The finding as matter of fact, that Joseph Stiner, prior to May 1860, carried on business (implying, alone) in teas, coffees and sugars, and during that month took Jacob Stiner as his partner, forming the firm of "J. Stiner & Co." has not a particle of evidence to sustain it. Such a finding might be injurious to Jacob Stiner, who really established the business in 1855, or about that time, and for years hired Joseph Stiner as a clerk. In a mercantile point of view, the reversal of this finding is important to Jacob Stiner, as the finding is certainly most unjust to him.

II. The opinion of Clerke, J., in pronouncing final judgment at the special term, does not acquit Joseph Stiner, altogether, but uses this language: "Whatever reason we may have to suspect that the defendant knew that the plaintiffs had commenced a negotiation with Hasbrouck and Roe for the lease, there is no evidence that he knew anything of it when these gentlemen called upon him; and in answer to a question put by me to Mr. Roe, he said that the defendant had said or done nothing at the time they called, to induce them to suppose that he represented the plaintiffs, or was acting on their behalf." This furnishes a part of the key to the reasons for the judgment against the plaintiffs. Though a court of equity may have every reason to suspect a fact, it cannot act so long as it does not positively know it. How much relief has such a court furnished heretofore, upon the basis of reasonable, well founded suspicion?

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III. The opinion of Clerke, J. also contains the startling principle, that an individual can take advantage of another's mistake, knowingly and designedly, so long as he says or does nothing to produce it. It is hard to conceive what fraud is, if that is not fraud. That is certainly *suppressio veri*.

IV. The opinion altogether is rather a calumnious opinion in favor of Joseph Stiner. It certainly does not say that his conduct was right in morals, or such as ought to have proceeded from an individual gifted with a delicate sense of honor.

V. It will be observed that the lessors do not, in their answer, either set up the statute of frauds as a bar to the enforcement of an oral understanding between them and the plaintiffs, or interpose any defense of any kind to prevent the lease being given to the plaintiffs. It is not disputed by them, 1st. That the plaintiffs first treated with them for the store; or, 2d. That they intended to call on the plaintiffs about it; or, 3d. That their transactions with Joseph Stiner commenced, and ended, in mistake. The case is virtually this: The plaintiffs went to great trouble and expense in discovering this store; they offered for it almost the very terms embodied in the lease in question; (if anything, better terms;) they are the parties the ground owners came to the city to negotiate with; and their not getting the store was the result of a mistake on the part of the owners, and of fraud on the part of Joseph Stiner. The question is not as it would have been if no lease had been executed. Under existing circumstances, all previous matters are shut out, except as throwing light upon the plaintiffs' right to claim the lease. The owners meant to give it to them. Shall this intention be frustrated, or not?

VI. Joseph Stiner cannot raise the defense of the statute of frauds. That is personal to the lessors. They do not rely on it.

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VII. If the lessors were under no obligation to the plaintiffs to give the lease originally, their present status is decided by the actual execution of a lease, and the intention to give it to the plaintiffs. Having executed and delivered it, they cannot be heard to defeat their own intention in reference to it. If this lease was meant to be to the plaintiffs, equity considers it was a lease to them.

VIII. The lease being intended for the plaintiffs, the court can take it from Joseph Stiner, first, either at the instance of the lessors; or, second, at the instance of the plaintiffs. It is property, and equitably the plaintiffs' property. It was made and delivered for their use and benefit. *Benton v. Pratt*, (2 *Wend.* 385,) furnishes a principle supporting this action. The doctrine of "implied trusts" is very ductile. The principle underlying it is capable of indefinite tension. (2 *Story's Eq. Jur.*, by *Redfield*, §§ 1263 to 1265.) He who prevents an act being done to another, fraudulently, and draws it to himself, is in equity a trustee. (1 *id.* § 439. *See also* §§ 437, 438.) Joseph Stiner having taken a lease, with notice of the plaintiffs' rights, and of the friendly relations of the lessors towards them, his act is affected by notice. (1 *id.* §§ 395, 400.) The opinion of Cardozo, J., in granting the injunction order is a correct, practical application of the principles governing a court of equity in a case of this kind.

IX. If it be said that there was no contract between the plaintiffs and the lessors, for the lease; that there was no meeting of minds upon its terms, as between them; the answer is, that is unnecessary, either at law or in equity. At law, a party can affirm a tort, and make a contract. In equity, certain parties (such as *cestuis que trust*) can take the benefit of transactions they were not direct parties to, upon this principle of affirmance.

X. It cannot be said that Joseph Stiner acted in ignorance of the plaintiffs' rights. He was warned, in advance, that he was not the person who had been to Newburg. He

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thus knew the lessors were not after him, but some one else. If he did not inquire into the circumstances, it was his own fault. He is to be held to know all that he could have learned from Messrs. Hasbrouck and Roe, if he had questioned them. This shows his fraud. His hostility to the plaintiffs confirms it.

XI. If Joseph Stiner had been a mere stranger, acting in good faith, uninformed that other parties were after the store, and that he was supposed to be one of them, his standing might be different. Can this court doubt that he knew with whom he was interfering? So the case would be altered if the lessors asserted that they gave out the lease to Joseph Stiner, in the independent exercise of their rights as owners, ignoring the plaintiffs and all the world.

XII. This action is not designed to undo the transaction in question, but to enforce it, as intended, in favor of the plaintiffs.

XIII. If a valuable consideration is needed to sustain the plaintiffs' claim, it can be found in the trouble and expense they incurred in endeavoring to secure the lease.

XIV. The plaintiffs offered to accept the lease in question before and at the time this action was brought, and to give all indemnity to Joseph Stiner, in the matter.

XV. The findings of fact and law, as excepted to by the plaintiffs, are erroneous, and contrary to evidence. The findings of fact and of law proposed by the plaintiffs should have been upheld, and the exceptions to the refusal to do so are well taken.

XVI. So far as the case is covered by the admissions of the answer of the landlords, (and in those respects it has never been combatted by Joseph Stiner,) it should be deemed conclusive upon the defense. It is seldom that a party receives a judgment based upon a fact not presented in, or covered by, his pleading. If this rule is applied to this controversy, the court is saved the trouble of wading through, and weighing the effect of, contradictory proof.

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The statements of that answer, in this point of view, simply become a matter of construction or interpretation, so far as the facts involved in them are concerned. Coupling the fact they contain, that Messrs. Hasbrouck and Roe informed Joseph Stiner that they had been applied to at Newburg for a lease of the premises, a few days before; the remark they made to him, that he was not the person who had called upon them; his reply, that he was not; with the undisputed fact that the lease was given to him on the supposition that it was for the benefit of that person, and that the mistake of the landlords was not discovered until some thereafter, and then through the plaintiffs, how can the plaintiffs fail to have judgment in their favor? The pretense that he stated he did business on his own account, is met by the certainty that if he said that, the other fact, that there was a mistake on the part of the landlords, could not have existed. It is impossible those two things can be true. The issue is thus brought to this: if Joseph Stiner told Messrs. Roe and Hasbrouck he was acting for himself in getting the lease, and they gave it to him, they did it intentionally, and without mistake; if he did not tell them that, he fraudulently drew them into their mistake. If this be so, the law is perfectly plain. (1 *Story's Eq. Jur.* § 151, *Redf. ed.* 1866.)

XVII. The judgment in question should be reversed, with costs to the plaintiffs; and if an absolute judgment is not rendered in their favor, a new trial should be granted, with costs to abide the event.

Ira Shafer and E. W. Stoughton, for the respondents.

I. The plaintiffs are not entitled to the relief demanded, as against Roe and Hasbrouck, because of the following indisputable positions. There was no term agreed upon at Newburg; "five years or so" was talked of, says Moses. There was no rent agreed upon; "an increased rent" was

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spoken of. There were no covenants or conditions agreed upon. There were no propositions of a precise or definite character, capable of ascertainment or enforcement, made by the plaintiffs or accepted by Roe and Hasbrouck. The plaintiffs and Roe and Hasbrouck talked upon the subject of renting the store, at Newburg, and the latter promised to call and see the plaintiffs when they came to New York, provided they concluded not to re-let to Worley. When they left Newburg they had not determined not to re-let to Worley, but, on the contrary, they determined to re-let to him, and called to see him in the morning. Failing to find him in, they again made efforts to see him, until 3 o'clock in the afternoon, for the purpose of re-letting the store to him. The defendants Roe and Hasbrouck insist, in their answer and evidence, that they were not legally or otherwise bound to let the store to the plaintiffs. The alleged lease between the lessors and Jacob is void, by the statute of frauds, being for "five years, or so," and "for a longer period than one year," * * and there being no note in writing, expressing the consideration, subscribed by the parties. (2 R. S. 135, *marg. p.*, § 8.) It is void for uncertainty. "And if an agreement be so vague and indefinite that it does not show any mutuality in its terms, or that it is not possible to collect from it the full intention of the parties, it is void; for neither the court nor a jury can make an agreement for the parties. (*Chitty on Cont.* 65.) "Certainty as to the time when the term is to commence, its duration, and the amount of rent to be paid, is usually necessary to make an instrument operate as a present demise." (*Taylor's Landl. and Ten.* §§ 42, 70.) It does not amount even to the shadow of an agreement for a lease. "To constitute a valid agreement not under seal, there must be the mutual and definitive assent of both parties to the terms of the agreement." (*Chitty on Cont.* 64. *Jackson v. Delacroix*, 2 *Wend.* 433. *Taylor's Landl. and Ten.* § 42.) An

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action for the breach of the alleged agreement would not lie. The plaintiffs could not compel the lessors specifically to perform. The contract of which performance is sought, must be clearly proved, and its terms should be so specific and distinct as to leave no reasonable doubt of their meaning. (2 *Pars. on Cont.* 513.) Thus equity will not enforce a mere voluntary contract; for it permits one to withhold what he has, of his own accord, and not from any benefit to himself, or expectation of any benefit, volunteered to promise. (*Id.* 517.) It must be "certain." (2 *Story's Eq. Jur.* § 751.) It must be clear, definite and unequivocal in all its terms. (*Id.* §§ 764, 767.) Nor could they maintain ejectment. (*Jackson v. Delacroix*, 2 *Wend.* 433.) The converse of these propositions would be true if Roe and Hasbrouck had been actors instead of defendants. There was not even a moral obligation existing on the part of Roe and Hasbrouck to rent the store to the plaintiffs. (2 *Pars. on Cont.* 517.) It would seem to follow, from these authorities, and the principles established by them, that the plaintiffs, as against Roe and Hasbrouck, and *vice versa*, are remediless.

II. Roe and Hasbrouck do not seek to annul or cancel the lease to Joseph; on the contrary thereof, they affirm it to have been made in good faith, without fraud on their or his part, and to be a valid, binding lease. They both swear they are unwilling to cancel it. They could not, if they desired to, rescind the contract. No fraud was practised upon them. They saw, inquired of, and knew, the man to whom they demised. He did not assume to represent or personate the plaintiffs. He truthfully answered every inquiry made of him. They make no complaint whatever. The plaintiffs have no right to say to Roe and Hasbrouck, "disaffirm this lease." The plaintiffs have no right even to say, "we stand in the lessors' shoes, and have their rights as against Joseph." The law, as well as "the plainest principles of honesty and equity," forbid

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these plaintiffs coming into a court of equity and crying out against Joseph Stiner, "you have cheated Roe and Hasbrouck, and we will, although they do not, bring you to justice." The defendant was under no legal duty or obligation to the plaintiffs, whatever. 1. The relation of principal and agent did not exist, either by express contract or by implication. If Joseph's duty, as agent of the plaintiffs, was to hire the store for them, and he had taken the lease in his own name, he would have been guilty of a "plain fraud," of a "palpable fraud," and upon "the plainest principles of honesty and equity, he must be declared to be a trustee for the real owner." (*Story on Agency*, §§ 9, 210, 211.) Why? Because of "a confidence necessarily reposed in the agent, that he will act with a sole regard to the interests of his principal, as far as he lawfully may," (*id.* § 210;) and because of the rule, that "an agent employed to sell, cannot himself become the purchaser, and an agent employed to buy, cannot himself be the seller; so an agent employed to purchase, cannot purchase for himself, * * but he will be held as a quasi trustee." (§ 211.) *Parkist v. Alexander*, (1 *John. Ch.* 394, 396,) is an illustration of the doctrine. There "the intestate was intrusted by him (the plaintiff) with the agency of procuring a lease in fee of the premises, in the name of Alexander McKnight, and he promised to perform the trust. Instead of doing this, he afterwards purchased the equitable title of McKnight, and with the consent of McKnight, but without the knowledge or consent of the plaintiff, took the lease in his own name." * * "This, I think," said the chancellor, "cannot, and ought not to, be permitted. An agent, or trustee, undertaking a special business for another, cannot, on the subject of that trust, act for his own benefit, to the injury of his principal. This is a sound and fundamental rule of equitable policy." And upon this principle, *Brown v. Lynch*, (1 *Paige*, 147,) and kindred cases, were decided. Indeed, it may be laid

down as a general principle, that in all cases where a person is, either actively or constructively, an agent for other persons, all profits and advantages made by him in the business, beyond his ordinary compensation, are to be for the benefit of his employers. (*Story on Agency*, § 211. *Utica Ins. Co. v. Toledo Ins. Co.*, 17 Barb. 132. *Central Ins. Co. v. Protection Ins. Co.*, 14 N. Y. 85. *Conkey v. Bond*, 34 Barb. 276. *Torrey v. Bank of Orleans*, 9 Paige, 663.)

2. But the relation of principal and agent must have existed. (Same authorities.) 3. The defendant must have assumed some duty, trust or obligation, which he has violated and disregarded, before this doctrine can be applied to him. 4. There is no pretense that the plaintiffs were his principals for any purpose. 5. Nor is there any pretense that the defendant was their agent for any purpose. 6. Nor did he assume to act as agent for the plaintiffs, so as to enable them to adopt his unauthorized act; he acted for himself throughout, without their knowledge or consent, and without assuming to act for them. 7. Even the doctrine of ratification of unauthorized acts proceeds upon the assumption, (a.) That the relation of principal and agent existed. (b.) That the act performed had some relation to the general or special powers or duties of the agent, but in the particular instance was not binding for want of authority to the full extent of the thing done. (*Story on Agency*, §§ 239 to 260. *Dunl. Paley's Agency*, 171, note (0), 3d Am. ed.) (c.) An act performed by a person not the agent of another, in his own name, and for his own benefit, is incapable of adoption or ratification by another, as his act or deed, as has been repeatedly adjudged. Thus, in *Chanoine v. Fowler*, (3 Wend. 173,) the court held that notice of the non-acceptance of a bill of exchange cannot be given by a stranger, so as to enable the holder to avail himself of it. In the case of an insolvent vendee, a person without any authority from the vendor, stopped the goods *in transitu*; it was even doubted whether the subsequent

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approval of the vendor made the stoppage *in transitu* good. (*Siffken v. Wray*, 6 East, 371, 380.) In *Bartram v. Farebrother*, (4 Bing. 579,) where the attorney of an insolvent vendee had, upon his suggestion, and without instructions from the vendor, given notice to the wharfinger not to deliver goods, it was held that the subsequent ratification of the act by the vendor did not make it a valid stoppage. In *Doe v. Goodwin*, (5 Ad. & Ell. N. S., 143,) it was held that a notice to quit must be such that a tenant may safely act on it at the time of receiving it; and that a notice by an unauthorized agent cannot be made good by an adoption of it by the principal, after the proper time of giving it. (See *Dunl. Paley's Agency*, 345, 346.) The true rule is stated in *Wilson v. Tumman*, (6 Man. & Gr. 242,) thus: "That an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well established rule of law." Here there is no pretense whatever, from the case, that Joseph assumed to act for the plaintiffs; but he assumed "to act for himself;" and here is the insurmountable difficulty with the plaintiffs' case.

III. Instead of the relation of principal and agent existing, and instead of the defendant assuming to act for the plaintiffs in any way or manner, we find: That the plaintiff Jacob, and the defendant Joseph, had been partners in the business in which they are still engaged. That they dissolved, long prior to the transactions in question. That they became warm and earnest rivals and competitors in business. That each regarded the other as unfriendly, if not enemies. That Jacob regarded Joseph's rivalry and competition as in violation of an understanding. Each one was anxious to secure the premises in question, and made efforts to ascertain the owners. The plaintiff succeeded in finding them; the defendant failed, because, in

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the tax records, the name was written "Poe," instead of "Roe." It is idle, if not absurd, to say under these circumstances, that when Roe and Hasbrouck called on Joseph at his store, No. 6 Fulton street, he was under any duty, trust, or obligation whatever to the plaintiff. It is equally idle, under these circumstances, to say that Joseph acted, intended to, or assumed to act, for any one but himself.

V. Nor is there any valid pretense that he represented himself as the plaintiff; or that he personated the plaintiff. He did not know, nor did he have the least idea, so far as the case shows, that the plaintiffs had ever been in treaty for the premises. No such information was communicated to him by Roe and Hasbrouck. He made no misrepresentations of any kind or character, even according to the evidence as to the admission of Roe, "that they went right to No. 6 Fulton street, and asked for Mr. Stiner; that Mr. Stiner, the defendant, came forward, and that he (Mr. Roe) said: 'Why, you are not the man we saw at Newburg. Is he in?' That Mr. Stiner made some excuse, and said it was, or may have been his brother." Taking this version, which is denied by Roe, Hasbrouck, Joseph and Henriques, the defendant told the truth, aye, clearly informed Roe and Hasbrouck that it "may have been his brother." There is no pretense that Joseph knew who had been to Newburg; there is no pretense that the plaintiffs had published what they knew and had done to the world; at most, the defendant, upon their theory, suspected or believed that the plaintiffs had been in treaty with Roe and Hasbrouck for the store, and that they were in pursuit of them.

VI. We have some idea from the statute (2 R. S. 676, §§ 48, 49, 50,) as to what is intended or designed by falsely representing or personating another, and the charge that the defendant did either, is not only entirely unsupported by the case, but is ridiculous. How absurd it would be

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to charge the defendant with the offense described in section 50: "Every person who shall falsely represent or personate another, and, in such assumed character, shall receive any money, value, or property of any description, intended to be delivered to the individual so personated, shall, upon conviction, be punished * * as for feloniously stealing the money or property so received."

VII. The defendant has not committed legal fraud; although it is not conceded he has been guilty of even a moral fraud. It has been shown that no legal right of the plaintiffs has been violated, and it follows that the plaintiffs have not, in law—in legal contemplation—sustained any damage. "And if no damage be caused by the fraud, no action lies." (2 *Pars. on Cont.* 269. 1 *Cowen's Treat.* 333. 2 *Kent's Com.* 480, 3d ed.) If the defendant has been guilty of moral fraud, the plaintiff is without remedy.

It is said we should have disclosed the fact that we were not "Stiner & Co." In *Keates v. Earl of Cadogan*, (10 *C. B.* 591; 70 *Eng. Com. Law R.*.) it was held "that there was no implied duty cast on the owner of a house being in a ruinous and unsafe condition, to inform a proposed tenant that it is unfit for habitation; nor will an action of deceit lie against him for omitting to disclose the fact." It is said that we have no right to remain silent. Such a doctrine has never been heard of. Why? Because of the settled doctrine, "If the seller (of goods) knows of a defect in his goods, which the buyer does not know, and if he had known, would not have bought the goods, and the seller is silent, and only silent, his silence is nevertheless a moral fraud, and ought, perhaps, on moral grounds, to avoid the transaction. But this moral fraud has not yet grown into a legal fraud. (1 *Pars. on Cont.* 461.) "Common honesty," as well as "morality," would require the purchaser of an estate to disclose to the seller his knowledge of the existence of a mine in the land of which he

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knew the seller was ignorant; yet that great lawyer and judge, Lord Thurlow, thought that neither law nor equity, as administered in the tribunals of justice, required him so to do. (*Fox v. Mackrath*, 2 Bro. 240; and see Lord Eldon's opinion in *Turner v. Harvey*, *Jacobs' Rep.* 178.) If the plaintiffs' doctrine can be maintained, it would seem to follow: 1. That it is unsafe, indeed impossible, for a landlord to even talk with a person upon the subject of renting premises, without incurring a liability to rent. 2. That when a person desires to hire premises, and converses with the landlord upon the subject, he is thereby entitled to a lease of them. 3. And that a third person, who hires from the lessor, after this talk, does so at his peril; if he secures a lease, he holds it as trustee for the other party; and if he refuses to surrender it, he is liable to an action to compel him to do so.

And these same considerations are applicable to sales of real estate, personal property, and indeed to everything capable of being leased, sold and transferred, and it may be applied to all commercial transactions. If the lessors were seeking to annul this lease, they would be refused relief, because of this familiar principle of equity. Story says: "The rule as to ignorance or mistake of facts entitling the party to relief, has this important qualification, that the fact must be material to the act or contract, that is, that it must be essential to its character, and an efficient cause of its concoction." (1 *Story's Eq. Jur.* § 141, 3d ed.) Where the parties make just such instruments as they intend to make, they are not entitled to relief, (*Arthur v. Arthur*, 10 *Barb.* 9;) and that too, even though they mistake the law. *Pothier (on Obligations)*, tells us when a contract may be avoided when there has been a mistake as to the person. He says: "Here the question arises whether an error respecting the person with whom I contract annuls the agreement? This should be answered with a distinction. Wherever the consideration

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of the person with whom I contract is an ingredient of the contract which I intend to make, an error respecting the person destroys any consent, and consequently annuls the agreement."

IV. Here there was no *suppressio veri*. There is no pretense that there was a misrepresentation, or *suggestio falsi*. As to the latter, see 1 *Story's Eq. Jur.* §§ 186, 193. Upon the other point, *suppressio veri*, see §§ 194-211. In *Robinson v. Justice*, (2 *Penn.* 19,) it is said that "silence will postpone a title only where silence was a fraud, and a fraudulent concealment of title could not be imputed to one who was ignorant that he had a title to conceal." By parity of reasoning it would seem to follow that it would be impossible for Joseph to be guilty of a fraudulent concealment of facts of which all hands agree he was ignorant.

INGRAHAM, P. J. The only ground upon which it can be held that a party obtaining a conveyance or lease of land may be compelled to hold the same as trustee for another, is where such party stood in a confidential relation to the other, and has used such relation to his own advantage. Wherever confidence exists, or is reposed, and one party has it in his power to sacrifice the interest of the party he is bound to protect, he will not be permitted to hold any advantage that he may have obtained personal to himself, to the injury of him to whom he owed a duty or trust. In such a case equity will compel him to give to the party injured the benefit he has obtained, even if no fraud is shown. But where no fraud is shown, in fact, and no relation exists between the parties in which either party owes a duty to the other, and no breach of trust or confidence is shown, then whatever advantage one man may gain over the other by a sharp bargain, or an over-bidding of another, cannot be interfered with.

If fraud was practiced in this case on Hasbrouck, the landlord, he might in equity have set aside the contract,

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but no such right accrued to the plaintiff, from the fact that he wanted the lease in question, which the defendant obtained; even though he concealed the fact, that he did not represent the plaintiff in his negotiations. The defendants owed the plaintiffs no duty, the plaintiffs had acquired no right to the lease, and between them there was no relation of confidence, which could create the obligations that arise from such trusts.

In fact there was no right on the part of the plaintiff to the lease, either from Hasbrouck or the defendant. He had no claim to it, in any view of the case, and there is no principle of equity which would allow the court to adjudge the defendant to stand in the relation of trustee to the plaintiff.

As to the facts on which the plaintiffs allege fraud to have existed, as proved on their part, the defendants have given evidence denying such fraud, and it became a question for the decision of the court, whether any such fraud had been committed. Upon this point, the finding of the court is that the defendant did not intentionally or fraudulently divert the lease from the plaintiffs; nor did he know, prior to its execution, that the landlord meant it to be a lease to the plaintiffs; nor did he in any way fraudulently suppress the truth, in the premises. This finding is conclusive upon the question.

The exceptions as to the questions put to the witnesses, whether the defendant did acts to induce them to believe that he was the plaintiff, are not well taken. That inquiry was nothing more than to ask whether they did so believe from conduct which had been previously given in evidence; and a similar question to the defendant, whether he intended to personate the plaintiff, was admissible as to his intent. What he did do was fully in evidence, and inquiries as to the effect of these acts were not erroneous.

There is no good reason for interfering with the judgment appealed from.

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GEO. G. BARNARD, J. I know of no principle of equitable jurisprudence under which the plaintiffs are entitled to a judgment, in this action. The plaintiffs never had any legal right to a lease from the owners of the premises. No terms of lease were ever agreed upon between the plaintiffs and the lessors. No term, no rent; no covenant of any kind; no promise for a lease at all.

• There was simply an expression of a willingness to take a lease if the parties to it could agree. The owners were at full liberty, so far as any evidence in the case discloses, to refuse a lease to the plaintiffs. There was no payment. There was no absolute promise. There was no writing. There was no promise by the plaintiffs to take a lease. As far as the lessors are concerned, they were never obliged to execute a lease to the plaintiffs. What, then, has the defendant Stiner said or done which gives the plaintiffs a right which they did not have at the execution of the lease? The Stiners were not friendly—were business rivals, and in the same business. The defendant Stiner did not represent the plaintiffs; told them he was doing business for himself; knew the premises, and would hire them. If he knew that the plaintiffs were willing to accept a lease on the same terms as were granted to him, he was under no legal obligation to refuse the lease. He told no lie. He suppressed no truth. He falsely personated no one. He did not represent himself as acting for any one but himself. The lessors were at full liberty to contract. He has taken nothing which the plaintiffs had a right to. He has taken nothing by any means which legally makes him a trustee for the plaintiffs. Assuming that the owners were mistaken in the defendant Stiner, that fact gives no right to either the plaintiffs or the owners to annul the lease, if the mistake was not produced by the defendant Stiner. That he did not cause the mistake, if there was one, is found by the court, and the finding is fully sustained by the evidence. Joseph Stiner is there-

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fore without fault, in law. He is entitled to his lease, and this judgment should be affirmed, with costs.

CARDOZO, J., (dissenting.) It was error to allow the witness Solomon Henriques to answer the question whether Joseph Stiner "assumed to personate the plaintiffs or either of them," in his interviews with the landlords. It called for an opinion upon what Joseph Stiner did, instead of requiring the witness to detail what was said and done, leaving to the court to deduce the conclusion. And as the inquiry bore pointedly upon an important branch of the case, namely, circumstances tending to show whether a fraud had or had not been perpetrated by Joseph, we cannot say that the error was of such a character that it could not "have produced injustice in the general result;" and it is only when that can be said, that an erroneous ruling on the trial of a cause on the equity side of the court can be disregarded. (*Forrest v. Forrest*, 25 N. Y. 512.) The question to Joseph Stiner himself, whether "he personated" the plaintiffs may be upheld as calling for a fact, and a fact attributed to the witness himself; but the question to Henriques goes much further, and calls upon him to decide upon the point whether what occurred amounted to a personation of the plaintiffs. That was for the court, not for a witness to determine.

But I am not disposed to let my objection to this judgment rest upon a mere question of evidence. I want to put it plainly and distinctly upon the broad ground that the act of which Joseph Stiner was guilty was unholy in the law, and that no matter how adroitly it may have been accomplished, a court of equity, condemning it as a fraud, will treat him as a trustee of the property for the benefit of, and oblige him to transfer it to the plaintiffs. This is a principle of equity jurisprudence so well understood and recognized, that not only is it not necessary to cite authorities to support it, but it was not attempted to be disputed

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by the learned counsel who argued for the respondents. Indeed that distinguished gentleman, as might have been expected from one whose views of right and wrong are so accurate, did not hesitate to say that if the evidence on the trial led to the same result, as to the facts, which I reached upon the affidavits when the motion to dissolve the injunction was argued before me, the law as I laid it down in in the brief opinion I then pronounced, was unquestionably correct. I want no better authority in support of my law, and I shall proceed to show that upon the case as developed on the trial at the special term, the facts bring this matter directly within the principles I have mentioned.

The judge, at special term, has found that the lease was executed and delivered to Joseph Stiner under the belief on the part of the lessors that it was to and for the benefit of the person or persons on whose behalf one of the plaintiffs had called upon them at Newburg, and the contrary thereof was not discovered by the landlords for some time thereafter. It is plain, therefore, that by mistake of the landlords the defendant Stiner has obtained what was designed for the plaintiffs; and if he has in any degree misled the landlords into the belief that in giving that lease to him they were doing the same thing as if they were dealing directly with the plaintiffs, then no matter how cunning the artifice to which he resorted, nor how little he did or said to produce that impression, if he did anything for that purpose it was a fraud, and he cannot be permitted to keep the fruits of it, if the plaintiffs elect to treat him as their trustee.

It was not necessary that he should say that he was a member of the plaintiffs' firm. A shrewd man, bent upon getting an advantage like that which Joseph Stiner has taken of these plaintiffs, would undoubtedly avoid announcing, in so many words, that he was perpetrating a fraud. He would very likely say, as he claims he did, that he was not a member of the plaintiffs' firm, but did

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business on his own account; but the question is, did he not say something else which led to the mistake of which he seeks to reap the benefit? That he did, and that everything else which has been testified to or found in this case is consistent with the fact that his other statement, to which I shall presently allude, misled the landlords, I think I can easily demonstrate.

When Messrs. Roe and Hasbrouck came to this city, they happened accidentally to call at a store of the defendant Stiner, which adjoined the one kept by the plaintiffs. They were in fact in search of the plaintiffs. When they saw Joseph Stiner, he was informed that he was not the person who had called upon Mr. Hasbrouck at Newburg. Now, that anybody can believe that Joseph Stiner, with that information, and with what transpired at that interview, did not know that his next door neighbors were the persons that had called upon Mr. Hasbrouck, and whom his visitors then sought, is incredible; and whether or not the law called upon him to tell them so, common honesty, as I have before remarked in this case, certainly did. But still, if he did nothing to deceive, perhaps his crime was not cognizable in a human tribunal. It is not necessary to say. But what did he do? He told them that he was not the person that called upon them at Newburg, "*but that they could do the business with him.*" What matters it that he did not personate one of the plaintiffs? What matters it that he told the landlords he was in business on his own account, when at the same time—when admonished that he was not the individual they expected to see—he says, nevertheless, you can do the business with me. Was it not as much as to say, though I tell you I am in business on my own account; though I do not tell you that I am one of the persons who have called upon you; yet I do tell you that you can do the business with me. And is that not as much as to say, it is just the same whether you see them or me? That is why, though Jo-

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seph Stiner did not personate one of the plaintiffs, the intelligent landlords who dealt with him were misled into the belief that the plaintiffs were getting the lease. Except for that statement, "you can do the business with me," can any one believe that the Messrs. Roe and Hasbrouck, in the face of the fact that Joseph Stiner did not personate one of the plaintiffs, and informed them that he did business on his own account, could have been misled into the belief that they were giving, as the judge has found, a lease to and for the benefit of the person or persons on whose behalf one of the plaintiffs had called upon them at Newburg. Of course Joseph Stiner did not say, I am "Jacob Stiner" or "Mr. Moses" or one of the firm of Jacob Stiner & Co., but he said "that makes no difference, you can do the business with me." By that assertion he misled the landlords into giving to him a lease, believing it was being given to or for the benefit of the plaintiffs. By that assertion he misled the landlords into the belief that he was acting for the benefit of the plaintiffs; and having through that obtained this lease, his attempt to retain it is a fraud which a court of equity should not uphold.

The judgment below should be reversed, and a new trial ordered.

Judgment affirmed.

[FIRST DEPARTMENT, GENERAL TERM, at New York, January 3, 1871.
Ingraham, P. J., and Geo. G. Barnard, and Cardoso, Justices.]

INDEX.

A

ABANDONMENT.

See INSURANCE, (MARINE,) 3, 4.

ACCORD AND SATISFACTION.

See BOARD OF SUPERVISORS, 10.

ACCOUNT.

1. A complaint stated that the plaintiff and defendant, being copartners in business, dissolved copartnership, on a day specified, when it was agreed that an inventory should be taken of the assets of the firm, including the notes and accounts due to it, and that the defendant should pay the plaintiff one half of the amount of the inventory, deducting one half the liabilities of the firm, which the defendant assumed to pay; that such inventory was taken; the precise amount due to the plaintiff ascertained and agreed upon; and the defendant went into and remained in possession. The prayer was for an account of the partnership dealings, and that the plaintiff have judgment for the balance which should be found due him, on such accounting. *Held* that the complaint was clearly in an action at law; and the demand for an accounting was merely nugatory, it being not only wholly unsupported by any allegations in the complaint, but inconsistent with the case made by the complaint, which asserted that the account was

adjusted, the amount liquidated, and the balance agreed to be paid. *Short v. Barry*, 177

2. *Held, also*, that although it appeared from the findings of the referee that an account was necessary to settle the equities between the parties, and an action might be maintained for that purpose, if the defendant should refuse to render such account, or to pay the balance; yet that such was not the cause of action set up in the complaint, which was assumpsit, at law, and not an action of purely equitable cognizance. And that the referee erred in proceeding to take an account. *ib*

ACTION.

1. An action at law, for goods sold and delivered, cannot be changed into an action in equity for an account between the parties. *Short v. Barry*, 177
2. Where the facts stated in a complaint constitute a cause of action for the recovery of damages for false and fraudulent representations made by the defendant in negotiating the sale and transfer of a bond and mortgage in payment for land purchased, and the prayer for relief is a demand of judgment for damages in a specified amount, the action must be held to be, and treated as, an action at law to recover the damages sustained by reason of the fraud. *Graves v. Spier*, 349
3. And this, notwithstanding there is also a prayer for relief in the alter-

native—"or that the defendant be adjudged to reconvey the premises," to account for the use, income and profits thereof, or for other relief; where no cause of action which could entitle the plaintiff to the alternative relief is stated in the complaint. *ib*

4. A cause of action for fraud in the purchase and sale of real estate survives, to and against the personal representatives of a deceased party to the transaction, and is therefore assignable, so that the assignee may maintain an action upon it. *ib*

See COMPLAINT, 4, 5.

DECEIT.

JUSTICE OF THE PEACE, 1, 4.

MARRIED WOMEN, 4, 6.

PROMISSORY NOTES, 6.

WATER, 5, 7, 9.

ADVANCEMENTS.

See PARTITION, 1, 2, 3, 4, 7.

AGREEMENT.

1. In the case of indorsements of commercial paper, by accommodation indorsers, the law does not presume an agreement between the maker and indorser that the latter shall be compensated for the favor of his indorsement. If compensation is claimed, the indorser must show that there was a special agreement that he should be compensated for such use of his credit. *Perrine v. Hotchkiss*, 77

2. The law allows a party who becomes surety for another, by way of indorsement or otherwise, to agree upon a certain price for the use of his credit. But unless there is some specific contract fixing the price to be paid, a surety cannot recover for the use of his credit by the principal. *ib*

3. The defendants agreed to send to the plaintiffs, at San Francisco, "all the balance of the iron for said railroad, now lying in Boston or New York, amounting to about fifteen hundred tons, which said iron was originally purchased by C. L. W.

from W. F. W. & Co., of Boston." Held that this language was simply descriptive, and did not constitute a warranty that the particular article existed. And that if the article was not at the places from which the defendants were to transport it, the omission to send it would be no breach on their part. *Robinson v. Flint*, 100

4. The contracts of a county clerk, in the name of the county, for printing necessary and proper to enable him to perform the duties of his office, are binding upon the county. *The People ex rel. Kinney v. The Board of Supervisors of Cortland County*, 139

5. And an individual having been employed by a county clerk or surrogate to do his printing at an agreed price, such employment being within the scope of the clerk's or surrogate's authority, and the sum agreed to be paid being no more than a reasonable compensation for the services, the board of supervisors are not at liberty to interfere with such contract, but should cause to be levied and paid the amount due thereon. *ib*

6. Where the minds of the parties to a contract do not meet upon the whole and exact terms of such contract, the same is void. *Pullerton v. Dalton*, 236

7. An article designated in a contract as "slops from their distillery," does not constitute a manufactured article, within the meaning of the rule which implies a warranty of merchantable quality. *Holden v. Clancy*, 590

8. Nor is an agreement, by lessors of a cattle barn to furnish to the lessees, at said barn, slops from the distillery of the former, to a specified amount per day, during the term, an agreement to manufacture or furnish a manufactured article, in the sense of the rule referred to. *ib*

8. Although the residuum, or refuse, of various kinds of manufactories is more or less valuable for certain purposes, and may be the subject of sale, yet the *quality* of such refuse matter is wholly subordinate to the process which is the main object of the manufacturer; and it is not ex-

pected that his skill and attention will be devoted to it. *ib*

See COUNTY CLERK.

PROMISSORY NOTES, 1, 2, 3, 4, 5, 9 to 13.

SET-OFF, 3.

STOCK, 1, 4.

AMENDMENT.

See COMPLAINT, 3.

APPEAL.

1. Where an order is made by a county court, upon a motion in an action pending in that court, an appeal to the Supreme Court from such order brings nothing into the appellate court, except the *motion*, and *copies* of the papers on which it was founded. The *action* still remains pending in the county court, and no other court can render the judgment. *Barker v. Wing*, 78

2. Thus where a verdict was rendered in favor of the plaintiff, in the county court, but before entry of judgment thereon, the defendant moved for a new trial, in that court, which motion was granted, and then the plaintiff appealed to the Supreme Court, where the order granting a new trial was reversed, and a new trial denied, and judgment ordered on the verdict, with costs; *Held* that such judgment was irregularly and improperly entered, in the Supreme Court; and the same was set aside. *ib*

3. The Code has not changed the practice which formerly existed, on the subject of rendering judgments by courts of review. The "customary practice" still prevails, under rule 93 of the rules of practice. *ib*

4. And as there never was any "customary practice" of entering judgments by the appellate court, in a case of that nature, such a judgment is without precedent or authority to sustain it. *ib*

5. An order of reference, made at a special term, is not brought up by an appeal to the general term from the *judgment* entered in the action.

Such order, if erroneous, should be corrected by a direct appeal from it to the general term. *Terry v. McNiel*, 241

6. Where a reference is by consent, and the action is tried without objection that it is not a referable action, no question can be raised, on appeal, in regard to the mode in which it was tried. *Graves v. Spier*, 349

7. Although an appeal lies from an order for an allowance, yet when the allowance is granted at the trial, by the judge then presiding, who has seen and can best appreciate whether it is a difficult and extraordinary action, it must be a very glaring case of an excessive allowance which can justify interference with his discretion by an appellate tribunal. *The Oneida National Bank of Utica v. Stokes*, 508

See REFEREE.

APPEARANCE.

See DIVORCE, 1.

ASSESSORS AND ASSESSMENTS.

1. Assessors have no power or authority to make an assessment against an individual after they have completed their roll for review, or on the day fixed for review. *Clark v. Norton*, 434

2. The defendants exercised the power devolved upon them as assessors, in the months of May and June, 1868, and adjudged the plaintiff to be liable to assessment for that year, in the sum of \$2750, for real property, only, and completed their roll, and gave notice of the time and place of reviewing the same. *Held* that with this act their power and authority to determine assessments for the current year was exhausted; and that they had no power, afterwards, to strike out the assessment against the plaintiff, for real estate, transfer such assessment to a purchaser of the property, and assess the plaintiff on the roll in the same amount, for personal estate. *ib*

3. An assessment, made after the expiration of the time during which assessors are empowered to determine what persons, and what property shall be assessed, is made without authority, and void. *ib*

See NEW YORK, (CITY OF,) 5, 6, 7.

ASSIGNEE.

See ACTION, 4.
EVIDENCE, 5.
PARTIES.

ASSIGNMENT.

See DEBTOR AND CREDITOR, 2, 3.
EVIDENCE, 7.
PARTIES.

B

BOARD OF SUPERVISORS.

1. To provide in advance for the official printing of the several county officers, is no part of the duty of a board of supervisors. *The People ex rel. Kinney v. The Board of Supervisors of Cortland County*, 189 *ib*
2. The board has no authority or power, except what is derived from the statute; and the statute does not authorize or empower them to contract, in advance, for such printing. *ib*
3. They have no power or authority to direct the clerk of the board whom he shall employ to do his official printing; or to direct, in advance, what price he shall pay, or agree to pay. *ib*
4. When a bill is presented, for services rendered to the county, the supervisors—unless the compensation for such services be fixed by law, authority, custom or binding contract—have to consider and pass upon the charges, and allow such sum as in their judgment is right and proper. In such cases, they have a *discretion*, which will not be interfered with by a *mandamus* directing how that discretion shall be exercised. *ib*

5. If the statute prescribes the sum to be received for such services, the board are required to allow the bill according to such statute. They have no discretion over it. *ib*
6. If the sum is fixed by a binding contract, the board are equally bound to allow the bill, in accordance therewith. *ib*
7. The relator having done printing for the sheriff, at his request, but without any contract as to the price, such printing consisting of legal notices required by law to be published; *Held* that he was entitled to charge therefor the sum allowed by law; and that the board of supervisors should have allowed him that amount, without any deduction. *ib*
8. When the statute allows an individual to collect, for a service rendered the county, not more than a sum specified, he cannot be compelled to take less. *ib*
9. When a newspaper is designated by a board of supervisors as one of the papers in which the session laws shall be published, in the absence of any contract with the proprietor, as to his compensation, he is entitled to the compensation prescribed by law; and the board of supervisors has no right to reduce the allowance to him below that amount. *ib*
10. After a board of supervisors had passed upon an account presented by the relator, it caused to be made and delivered to him, an order on the treasurer, for the payment of the amount allowed. The relator refused to receive it in full of his claim, and notified the person handing it to him that he should at once commence a proceeding to compel the board to allow him the balance claimed. He subsequently tendered back the order to the same person, who refused to receive it. He afterwards received, and retained, the avails of the order. *Held* that the relator was not *estopped*, by this act, from disputing the correctness of the action of the board. And that the act of receiving the money on the order, and retaining it, was no accord and satisfaction, because the relator refused to receive it in full. *ib*

BROKERS.

The compensation for brokerage in soliciting, driving or procuring the loan or forbearance of money being fixed by statute, it cannot be enlarged or changed, in a particular case, by any testimony. *Perrine v. Hotchkiss*, 77

See STOCK, 4, 6.

BROOKLYN.

Parade ground in. *See* MANDAMUS, 4.

C

CARRIERS.

1. Common carriers are liable in two capacities; one as insurers and one as warehousemen. If an injury happens to goods, from any cause except the act of God or the public enemies, while the carriers are insurers, an action lies against them, by the owners, for damages, and is made out without further inquiry. *Goodwin v. The Baltimore and Ohio Railroad Company*, 195

2. But if the injury happens after the goods are claimed to have been delivered, the question arises whether the defendants' liability as common carriers, in all its rigor, had, under the circumstances, ceased; and if so, whether the defendants had exercised that care of the property required of them as warehousemen. *ib*

3. Carriers are bound to deliver goods transported by them. Delivery is not effected by placing the property in a position where it cannot be obtained by the owner or consignee. *ib*

4. A quantity of sheet-iron, consigned to the plaintiffs at New York, and transported by the defendants, was unloaded upon the wharf, in New York. The plaintiffs received notice of the arrival of the ship in which the iron was brought, and received a small portion of the iron uninjured. On sending for the remainder, they were unable to get it until some days after it was placed upon

the pier, by reason of other freight having been so placed that the iron could not be reached. While it was in this position, it was damaged by rain. *Held* that the defendants were bound to deliver the goods at the usual place, and to deliver them in a conveniently reasonable method for their removal; and that the plaintiffs were bound to exercise reasonable diligence in removing them. *ib*

5. That it was for the jury to determine whether a reasonable time had elapsed after notice of the arrival of the iron, for the plaintiffs to remove it, before it was injured by the rain. *ib*

6. That after the expiration of a reasonable time for the removal of the goods, the liability of the defendants as insurers ceased, and their duty or liability became that of warehousemen, which required that they should exercise over the property, and for its protection, ordinary care and diligence. *ib*

7. That the burden of proof was upon the plaintiffs, to show that the defendants did not use such care and diligence; and if the jury found that negligence was proved, the defendants were liable, even, though their duty as common carriers was ended. And the jury having found a verdict for the plaintiffs; *Held* that it was sustained by the evidence; and the judgment entered thereon was affirmed. *ib*

8. The rule of damages which prevails in an action for the breach of a contract to transport goods from one place to another, where the owner is unable to procure the goods to be carried in any other manner, does not apply when, upon the failure of the carrier to perform, the owner of the goods can send them by another conveyance. *Grund v. Pendergast*, 216

9. In such a case the owner must send the goods by another conveyance; and if he does so, he will be entitled to recover the difference between the price at which the defendants undertook to carry the property, and the price which the owner was compelled to pay, for its transportation. *ib*

10. The rule as to the form of the judgment, laid down in *7th Wallace's Rep.* 258, is not binding on the state courts, and is not the correct one, but simply leads to great inconvenience, without any practical advantage. *ib*
11. Where a carrier of goods notifies the consignee of their arrival, and that they must be unloaded and taken away by a specified day, and then causes the goods to be unloaded before the time specified, and they receive injury in consequence of being thus unloaded, the carrier is liable, as such, for the damage resulting from the injury, whether guilty of negligence or not. *Cook v. The Erie Railway Company*, 812
12. If the goods are not unloaded until after the expiration of the time fixed for unloading and taking them away, then the carrier is bound to exercise such care and prudence in unloading and caring for them afterwards, and before they are removed by the owner, as a person of ordinary prudence would take of his own property. And if the goods are injured in consequence of the carrier's neglect to exercise such care and prudence, the carrier is liable to respond in damages for the injury. *ib*
13. And although the goods are not taken by the consignee within the time fixed for their removal, and he either neglects or refuses to take them within such reasonable time, yet the carrier has no right to cast the goods away, or to throw them out, or leave them where they will be open and exposed to injury from the elements. *ib*
14. In such a case it is the duty of the carrier to take care of them for the owner. And if he neglects this duty he will be held liable for the damages arising from a want of such care. *ib*
15. This care must be such, at least, as a prudent and careful man would take of his own property of like description. *ib*
16. A common carrier may discharge his liability entirely, by placing the goods in a warehouse at the place of destination, or by delivering them safely to some responsible third person who will undertake to keep them safely, and deliver them to the consignee when called for, in case the consignee cannot be found, or he refuses or neglects to take them away within a reasonable time after tender or notice. *ib*
17. After the arrival of goods carried by a railroad company, at their place of destination, and notice to the consignee, the latter commenced removing them, but residing at a distance of twenty miles from the depot, with only one team, he could not conveniently take more than one load per day. The goods were not put into a warehouse, or left with a third person for the owner, but were thrown out of the car, upon the ground, on the company's premises, and by the directions of their agent; and while in this situation, were wet and damaged by the rain, for want of shelter. In an action by the owner, to recover damages of the company, it was held that the question whether the defendant had taken proper care of the goods, and whether they had been injured by reason of their not having been properly cared for, was a question for the jury, and it was properly submitted to them. *ib*
18. The duty of a carrier is not fully discharged by transporting the goods and giving notice of their arrival, to the consignee; but continues until he has taken care of the goods, by placing them in a safe place, or in safe hands, for the consignee. *ib*
19. A carrier of goods is bound either to deliver them to the consignee personally, or to give him notice of the arrival thereof. *ib*
20. Where a carrier delivers goods to a person who has assumed to purchase them of the consignor, in the name of a firm, or to some one authorized by such person, and therefore to the person or persons to whom it was intended by the consignor that they should be delivered, he is not liable to the latter for the value of the goods on the ground that there has been a misdelivery. *Price v. The Oswego and Syracuse Railroad Co.*, 599
21. Where, in an action brought by the consignor, against the carrier, for the value of the goods, the claim was not that the goods were not

delivered to the very party to whom they were intended to be delivered, but that such party had assumed a fictitious name, or had falsely pretended to be doing business as a co-partnership, at the place where the order was dated, for the purpose of obtaining the goods without payment; *Held* that the truth or falsity of the representations should have been ascertained by the plaintiff before he parted with his property. And that the omission to do so was his negligence, and not that of the carrier. *ib*

22. A carrier is responsible for the delivery of the property to the party entitled to receive it, according to the address; and delivers it at the peril of being held liable for its value in case of any mistake in that particular. But if he delivers the property to the persons to whom it is addressed and to whom it was intended by the consignor that it should be delivered, the fact that the goods were obtained from the consignor by means of a fraud, and without payment of the price, will not render the carrier liable for such delivery. *ib*

23. Until the consignor, in such a case, shall have repudiated the sale, there can be no strictly legal right, on the part of the carrier, to withhold the property from the actual consignee, any more than though possession of it had been obtained by any other fraud; and upon tender of the freight, by the consignee, is bound to deliver the property to him. *ib*

24. In these days of extensive traffic, carriers could not abide the consequences of a rule which should impose upon them not only the responsibility of delivering the goods to the actual consignee, but that of determining whether the circumstances are not such as lead to a well grounded suspicion that some fraud has, by the use of fictitious names or otherwise, been perpetrated upon the consignor. *Per TALCOTT, J.* *ib*

See EXPRESS COMPANIES.

CASES COMMENTED ON, DISTINGUISHED OR DISAPPROVED.

1. The cases of *Wynnan v. Wyman*, (28 N. Y. 253;) *Smith v. The Saratoga*

Mu. Fire Ins. Co., (1 *Hill*, 497;) *Phelps v. The Gebhard Fire Ins. Co.*, (9 *Bow.* 404;) and *Burbank v. The Rockingham Mu. Fire Ins. Co.*, (24 N. H. 550,) commented upon, and distinguished from the present. *Lappin v. The Charter Oak Fire and Marine Ins. Co.*, 325

2. The decision in *Murray v. Smith*, (9 *Bow.* 689,) disapproved. *Hoyt v. Bonnett*, 529

COMPLAINT.

1. If the complaint in an action to recover the possession of personal property, states facts sufficient to show that in law the defendant's holding of the property is unlawful, that is sufficient; especially after judgment. *Fullerton v. Dalton*, 236

2. The omission to allege, in the complaint, a demand of the property before suit brought, is cured by proof of the fact, by the report of the referee, finding the fact of a demand, and by the judgment. *ib*

3. When the parties go down to trial, and a cause of action is proved, though the complaint may be defective, tested merely as a pleading, upon demurrer, it is the duty of the referee, or a court, to conform the pleading to the facts proved, in furtherance of justice; and, after judgment, if it be entered according to a case duly proved, it is the duty of the court to amend, or to regard the pleading as duly amended. *ib*

4. The prayer for relief, in a complaint, is no part of the cause of action, and does not determine the character of the action. *Graves v. Spier*, 349

5. The nature of the action, and the cause of action, are shown by the facts stated in the complaint. *ib*

See ACCOUNT.

ACTION, 2, 3.
FORCEFUL ENTRY AND DETAINER, 1.
MARRIED WOMEN, 5.
STOCK, 1, 3.

COMPOUNDING CRIMES.

See PROMISSORY NOTES, 1, 2, 3.

CONSTITUTIONAL LAW.

The act of congress approved March 8, 1865, amending the several previous acts providing for "the enrolling and calling out of the national forces," &c., which provides, (§ 21,) that in addition to the other lawful penalties of the crime of *desertion* from the military or naval service, there shall be a forfeiture of the rights of citizenship, &c., is constitutional. It is not an *ex post facto* law; neither is it a bill of attainder for the reason that it contemplates a trial by a court martial to enforce that penalty, together with the other penalties for desertion. *Gottshaus v. Matheson*, 152

CONVERSION.

See STOCK, 4 to 8.

COUNTER-CLAIM.

See PROMISSORY NOTES, 6.

COUNTY CLERK.

The contracts of a county clerk, in the name of the county, for the printing necessary and proper to enable him to perform the duties of his office, are binding upon the county. *The People ex rel. Kinney v. The Board of Supervisors of Cortland County*, 189

COUNTY COURT.

See APPEAL, 1, 2.

COUNTY TREASURER.

1. The compensation to a county treasurer, where the board of supervisors have omitted to fix it otherwise, is one half of one per cent for receiving, and one half of one per cent for disbursing moneys, until the commissions come up to \$500; which sum they cannot exceed, except in those counties where other compensations are fixed by law. *The Board of Supervisors of the County of Otsego v. Hendryz*, 279
2. In the absence of any act or resolution of the board of supervisors, fix-

ing the compensation of the county treasurer therefor, he is entitled to a commission of one per cent for receiving and disbursing moneys, between the time of the settlement of his account, for the previous year, with the board, in November, and the expiration of his term of office on the 1st of January, thereafter. *ib*

COVENANT.

See WARRANTY.

CREDITORS.

See LIEN.

CRIMINAL LAW.

1. Whenever a prisoner on trial puts his general character in issue by his own act, he takes the risk of its being proved bad, and of every presumption which such proof legitimately raises against him. *Burdick v. The People*, 51
2. And so, where a prisoner, upon trial on an indictment for a felony, avails himself of the privilege granted by the statute of 1869, (*Laws of 1869, ch. 678*,) of testifying as a witness in his own favor, he necessarily puts his general character and credibility as a witness, in issue, and makes it the proper subject of evidence on that question. *ib*
3. When he makes himself a witness, he becomes subject to all the rules applicable to other witnesses, notwithstanding his other character, of a party on trial for a felony. *ib*
4. The statute which allows a prisoner upon trial for a crime, to become a witness in his own behalf, at his own election, does not protect him from being impeached, the same as any other witness. *ib*
5. Where, upon a trial for murder, the question raised by the prisoner's testimony was, whether, situated as he was, there was reasonable ground for an apprehension, on his part, of a design on the part of the deceased, to do him, the prisoner, some great personal injury, and to believe there was imminent danger of such design

being accomplished; and the judge charged, as matter of law, that the homicide was not justifiable, even if the jury believed the facts and circumstances at the time, and before, the firing of the pistol which produced it, were as stated by the prisoner in his testimony; *Held* that the question was clearly a question of fact for the jury, and not a question of law for the court; and that the charge was erroneous because it took the question from the jury, entirely. *ib*

D

DAMAGES.

Where the evidence tended to prove a severe, and probably permanent, injury to the plaintiff's hand and wrist, arising from the defendant's negligence; *Held* that a verdict for \$2500 ought not to be set aside on the ground that the damages were excessive. *Maloy v. The New York Central Railroad Company*, 182

See CARRIERS 1, 8, 11, 12, 14.

HUSBAND AND WIFE.

WATER, 5, 7, 10, 11.

DEBTOR AND CREDITOR.

1. Mere delay by a creditor in entering judgment, or issuing an execution, is not sufficient to warrant any finding of collusion, so as to defeat a purchase made by the judgment creditor, at a sheriff's sale under the execution. *Devoe v. Brandt*, 498
2. A judgment creditor, after instituting proceedings supplementary to execution, against his debtor, may abandon such proceedings, and commence an action in his own name, to set aside assignments of a bond and mortgage, by the debtor and his assignee, as without consideration and fraudulent and void as to him, instead of proceeding in the name of a receiver appointed under section 299 of the Code. *Bennett v. McGuire*, 625
3. Conceding that where a receiver has been actually appointed, the action should be brought by him, such is

not the rule in all cases. The principle authorizing a receiver to sue in certain cases, is not in the way of an action by a judgment creditor, in the nature of a creditor's bill, for the purpose of having an assignment or other disposition of property by the debtor declared fraudulent, and the property applied to the satisfaction of the judgment. *ib*

See EVIDENCE, 7.

PROMISSORY NOTES, 16, 17.

DECEIT.

1. The very gist of the action for deceit is the fraudulent intent with which the representation is made; and that intent is not established by proof merely of the falsity of the representation; but knowledge, when it was made, by the party making it, that it was false, must be shown. *Robinson v. Flint*, 100
2. Where all the information possessed by the party making a representation was obtained from others, and there was nothing to show that he did not believe, or had not the right to believe, in the truthfulness of the information he had received; *Held* that no action would lie against him to recover damages for false representations. *ib*

DEED.

See WARRANTY.

DESERTION.

See CONSTITUTIONAL LAW.
ELECTIONS.

DIVORCE.

1. In an action by a husband against his wife, for a decree declaring a divorce obtained by her, from her former husband, in Illinois, void for want of jurisdiction and for irregularity, the complaint admitted that both parties went to Illinois, and that both appeared in the action there; *Held* that such appearance clearly gave the court jurisdiction over the persons of both parties;

and whether the court could grant a divorce depended not on jurisdiction, but upon the pleadings and evidence in the case. *Kinnier v. Kinnier*, 424

2. *Held, also*, that the plaintiff could not avail himself of such causes to have a marriage between him and the defendant declared void, when he, at the time, had knowledge of the divorce, and that the defendant had gone to Illinois to procure one. *ib*

3. Even if this court could, within a proper time, declare a judgment for divorce, rendered in the State of Illinois, void, no such action should be taken after the judgment has become absolute, and the time for appealing has expired, so that it cannot be reversed in that State. The judgment is then final, and the rights of the parties, under it, are perfect; and this court should not interfere with it. *ib*

E

ELECTIONS.

Inspectors of election have no right to exclude the vote of an individual, on the ground that the person offering it is a deserter from the army; where there is no evidence produced before them of the conviction of such person as a deserter and his consequent forfeiture of the rights of citizenship. *Gotcheus v. Matheson*, 152

EQUITY.

See SPECIFIC PERFORMANCE.
TRUSTS AND TRUSTEES.

ESTOPPEL.

See BOARD OF SUPERVISORS, 10.

EVIDENCE.

1. The books of a bank, not kept by either of the parties to an action, nor relating to transactions between them, but referring solely to transactions between the defendant and

the bank, are not competent evidence, between the parties, to show the amount of paper which has been discounted by the bank for the defendant, and the number of notes so discounted and renewed. And a statement made up from such books is equally incompetent. *Ferrins v. Hotchkiss*, 77

2. Whether letters, written by one person to another, containing statements of the amount of funds therewith, or previously, sent by the writer to the person addressed, which letters were received by the latter, and retained without objection or reply, are competent or sufficient evidence to show an implied admission by the recipient of the letters, of the truth of the statements therein? *Quere. Reseigue v. Mason*, 89

3. Account books of the plaintiff's intestate, so far as they give credits to the defendant, are admissible, because the entries are against the interest of the plaintiff; they are therefore competent evidence. *Terry v. McNiel*, 241

4. Prices current, published for public information, and for general purposes, in a public newspaper, are admissible in evidence for the purpose of showing what was the price of grain, in the market, at the time of publication. *ib*

5. In an action by the administrators of the assignee of a bond and mortgage, against the mortgagor, to recover the balance due thereon, a mortgage book, owned by such assignee, containing entries of payments, and of interest accrued, upon the bond and mortgage in question—after proof that such book, and the entries therein, had been shown to and examined by, the defendant, who made no objection thereto, claiming only that there was one receipt not credited therein—is admissible in evidence, not technically as a book, but as containing a statement of debt and credit between the parties, admitted to be correct, to a certain extent, by the defendant. *ib*

6. Where improper testimony is admitted, which may have influenced the mind of the judge, before whom

an action is tried, the judgment cannot stand. *Bennett v. McGuire*, 625

7. In an action against a judgment debtor and his assignee, to set aside assignments of securities made by him in fraud of creditors, the testimony of the debtor, taken upon his examination in proceedings supplementary to execution on the plaintiff's judgment, is inadmissible as against the assignee, and the wife of the debtor, who has taken a subsequent assignment of the securities, from such assignee. *ib*

See INSURANCE, (LIFE,) 3.
 NEGLIGENCE, 1, 3.
 PRINCIPAL AND AGENT, 7.
 PROMISSORY NOTES, 1.
 STOCK, 5, 6.
 WATER, 11.

EXCEPTIONS.

See PRACTICE, 1

EXECUTORS AND ADMINISTRATORS.

1. The statute does not limit the claims to be presented to executors by creditors, to such as are due. Whether due or not, if there is an intention to make a claim against the estate, notice of that claim should be presented, and if it be not due, the statute (2 R. S. 96, § 74,) points out the course to be pursued, upon the accounting. *Hoyt v. Bennett*, 529
2. Executors may select a place as their place of business or residence, so far as their relation to the estate is concerned; and the designation, in a notice published in the newspapers, of a place where claims of creditors, against the estate, shall be presented, makes that the residence or place of business of the executors, for that purpose, within the meaning and object of the statute. (2 R. S. 88, § 84.) *ib*
3. The decision to the contrary, in *Murray v. Smith*, (9 *Bow*. 689,) disapproved. *ib*
4. Where executors, on the presentation of a claim against the estate,

to them, positively declined, in writing, to pay the same; *Held* that this amounted to a rejection of the claim; although they, at the same time asked for a bill of particulars, and a list of vouchers. *ib*

5. *Held, also*, that the executors did not, by stating that they would be "greatly obliged" for a bill of particulars, &c., qualify their refusal to pay; they making no promise, and giving no intimation that their action would be altered by such a bill, if one were sent. *ib*
6. And that if the claimants neglected to furnish any bill of particulars, they could not claim that the demand for one was a qualification of the previous rejection. *ib*

EXPRESS COMPANIES.

The plaintiff, acting under a power of attorney from W., received from the United States government money due from the latter to W., and thus became the debtor to W. for the amount. W. directed the plaintiff to send the money, when collected, less charges, to W. care of M., at Terre Haute. No particular method of conveyance being designated, the plaintiff delivered a package containing the amount, in treasury notes, directed to W. care of M. at Terre Haute, to the U. S. Express Company, to be transported. Such package was carried, by that company, to the termination of its route, and there delivered to the defendant to be carried to Terre Haute. It was so carried, but after diligent search, neither M. the consignee, nor W. could be found, and the package was retained by the defendant. *Held* that as W. had no claim to any particular money, the plaintiff, when he delivered the treasury notes to the U. S. Express Company, simply delivered his own property to be forwarded, to discharge his indebtedness to W. And that both the plaintiff and W. had such a title to the property that an action might be maintained by either of them; and a recovery by either would bar an action by the other. *Thompson v. Fargo*, 575

F

FALSE REPRESENTATIONS.

See DECEIT.

PRINCIPAL AND AGENT, 5 to 9.
VENDOR AND PURCHASER, 8.

FORCIBLE ENTRY AND DETAINER.

1. A complaint under the statute relative to "forcible entries and detainers," which alleges that the complainant "had a good and legal right and estate to said premises, and that he still has a legal right to the possession of said premises," does not state the right, but the legal conclusion; and is therefore not a compliance with the statute; which requires that the complaint shall show that the complainant has some estate in the premises, then subsisting, or some other right to the possession thereof, stating the same. *The People ex rel. Cooper v. Field*, 270
2. That being a statute proceeding, and the authority to proceed derived from the statute, a strict compliance therewith is required; though this objection may be waived by omitting to make it in proper time. *ib*
3. H. being the owner of a lot, gave permission to F. to remove on to it a building owned by F. There was no agreement as to the time it should remain there, or for the payment of rent. Subsequently, H. conveyed the premises to third persons, who made an executory contract with the defendant and C. F. for the sale and conveyance of the premises to them, with the right of immediate possession; and they took possession. C. F. afterwards released his interest to the defendant. The latter, wishing to build upon the lot, requested F. to remove the said building, which F. agreed to do; and he consented that the defendant might excavate the earth up to the building; and the defendant did excavate up to the side, and in front of the building, without objection. Afterwards, F. sold such building to the relator, by a written contract

stating that the building should remain where it was, and F. retain the possession until the price was paid, when he was to give possession to the relator. F. remained in possession, under the relator, for some time, when he removed most of his things, and gave the key to the relator. The defendant subsequently removed the building from the premises, into the street. *Held*, 1. That the relator's possession, in law, if he had any possession, was precisely the same as, and no better than, that of his vendor, F. That the possession of F. was either that of a mere licensee, or as a tenant at will. And that whatever his interest had been before the sale to the relator, it had in part been surrendered to the defendant by F. 2. That F. knew as a fact, and was bound to know in law, that the defendant had all the rights that H. possessed when he, F., moved his building upon the premises. 3. That F., in law, could not deny the title of H. under whom he entered into possession; neither could he deny the title of H.'s grantees or alienees. 4. That if F. was a tenant at will, and if the relator could take a conveyance of such a tenure, the tenancy was destroyed by setting up the title of a third person, in hostility to the title under which he held, or went into possession. 5. That if there had ever been a tenancy at will, it was such an one that it had been terminated by the request of the defendant to remove the building and end the tenancy, and by the consent of F. to do so, and a surrender of a part of the premises by him, in pursuance of such request. 6. That the entry of the landlord, after this, was in pursuance of a legal right to enter; that he was revested with the right of possession, and could not be a wrongdoer in entering; and, as a legitimate consequence, could not be guilty of forcibly detaining that which was his own; having committed no act of violence upon the relator, or breach of the peace with a multitude of people, and with a strong hand. *ib*

FORFEITURE.

See INSURANCE, (LIFE,) 1, 2.

FRAUD.

1. M., a debtor of the plaintiff, who was insolvent, owing debts to various persons, assigned a bond and mortgage owned by him, to A. without consideration, by an instrument expressing the nominal consideration of one dollar, and A., on the same day, and for the same consideration and no other, assigned such securities to M.'s wife; the assignees receiving such transfers without paying or securing, or becoming liable to pay, therefor, any consideration whatever. *Held* that a fraudulent intent on the part of M. to prevent the plaintiff from collecting his demand, might be presumed; and that it might be fairly inferred, from the facts and circumstances, that A. and the wife of M. had full knowledge of such fraudulent intent. *Bennett v. McGuire*, 625

2. Even if it be conceded that in some cases fraud will not be inferred from the want of consideration, alone, yet the question of fraudulent intent is a question of fact; and where there is sufficient evidence to sustain a finding of fraudulent intent, it cannot be disturbed. *ib*

See LEASE, 2, 3, 4, 5.

PARTIES.

PROMISSORY NOTES, 6.

H

HUSBAND AND WIFE.

1. Where, upon the purchase of land by a married woman, through her husband acting as her agent, the husband makes false and fraudulent representations respecting a bond and mortgage given in payment of the purchase money, knowing them to be false; and such representations are material, and the vendor relies upon them, and sustains damages in consequence, an action can be maintained by him, or his assignee, against the wife, for the fraud. *Graves v. Spier*, 849
2. In such an action the measure of damages is, the difference between the value of the mortgage debt as it

would have been had the mortgaged premises been free from all prior incumbrances, as represented, and its value as it turned out to be, with the mortgaged premises incumbered by prior mortgages and judgments. *ib*

3. Where, in such a case, two prior mortgages were foreclosed by action, and the premises sold, in satisfaction thereof, and the same were struck off to the plaintiff's assignor, and an execution issued in an action brought by him upon the bond was returned unsatisfied; *Held* that the plaintiff was entitled to recover of the defendant the whole amount of the mortgage debt, over and above the surplus arising from the sale under the prior mortgages, with interest on that balance, by way of damages. *ib*

See MARRIED WOMEN.

I

INDORSEER.

See AGREEMENT, 1, 2.

OPINIONS OF WITNESSES, 1, 3, 4.

INJUNCTION.

See WATER, 8.

INSURANCE, (FIRE.)

1. Where a policy of insurance against loss by fire runs to the "assured, his executors, administrators and assigns," an action is properly brought, after the death of the assured, in the name of his administrator, if a right of action has accrued to any one by reason of the destruction of the property insured. *Leppin v. The Charlem Oak Fire and Marine Insurance Company*, 825
2. The administrator, in such a case, prosecutes for the benefit of the person or persons entitled to the moneys recovered on account of such loss; provided the contract remains in force; notwithstanding the change of title to the property insured. *ib*

3. A contract of insurance provided that the policy should not be assignable, before or after loss, without the consent of the company, manifested in writing thereon; that "in case of assignment without such consent, whether of the whole policy, or of any interest in it, the liability of the company shall then cease;" that "in case of any sale, transfer or change of title in the property insured, * * * or of any interest therein, such insurance shall be void and cease;" and that "in case of the entry for foreclosure of a mortgage, or the levy of an execution or attachment, or possession by another of the subject insured, without the consent of this company, indorsed hereon, this instrument shall immediately cease." The policy was for one year from December 7, 1867, and was renewed for one year from the latter date. On the 21st day of July, 1869, and during the life of the policy, the assured died intestate, and the property insured descended to his heirs at law. On the 9th of November, 1869, a total loss of the property by fire occurred. No consent had been indorsed upon the policy, by the company, at the time of the fire, and there had been long before, not only possession by others than the assured, of the subject insured, but a complete change of title, also. *Held* that the policy, by the clear and explicit terms and provisions thereof, became void, and ceased to have any binding force, upon the death of the assured, and the vesting of the title to the property insured in his heirs at law. That this was a change of title, from the assured to others, which brought the case within the express terms of the policy. *ib*

4. *Held, also*, that the possession of the property insured, by others than the insured, without the consent of the company indorsed upon the policy, also produced the same result. It put an end to the contract, and rendered it no longer obligatory. *ib*

5. Where the description of the property insured is made a part of the contract, and a warranty by the assured, and it is expressly provided, among other things, that in case of any misrepresentation or concealment, or omission to make known

any fact which increases the hazard, the insurance shall be void; and the property is described and insured as a *dwelling-house*, when in fact it is used in part as a *saloon*, which increases the risk; *it seems* the policy is void, and of no effect, by reason of this misrepresentation. *ib*

INSURANCE, (LIFE.)

1. After a life insurance policy has become forfeited, by its terms, by the non-payment of premiums, in an action thereon it is incumbent upon the plaintiff to show a receipt of the premium, by some one authorized to receive it, after forfeiture; or to show a ratification of an unauthorized receipt, by the company, by an acceptance of the money with knowledge of the facts, or in some other way. *Kolgers v. The Guardian Life Insurance Company*, 185

2. The fact that a clerk of the insurers had power to bind them by receiving money upon policies, is no evidence of his authority to waive a forfeiture by receiving the premium after a policy has ceased to exist, by reason of non-payment; especially where it appears that such clerk had always had strict orders to collect no premiums on forfeited policies; and that the company has never received the premiums so collected by him after forfeiture. *ib*

3. In an action upon a policy, the character and by-laws of the company are admissible in evidence, to show who was authorized to remit forfeitures. *ib*

INSURANCE, (MARINE.)

1. By the terms of a marine policy of insurance, the insurers were liable only for an absolute or total technical loss. The policy contained the following warranty: "Warranted by the assured free from loss or claims on account of capture, seizure, detention, or destruction by or arising from any belligerent nation, or from any seceding or revolutionary state or states of the union, or from any guerrilla party, or by or from any officer, civil or military, or other persons claiming to act in their name

or under their authority, or in their behalf." The perils insured against were those of the "seas, winds, waves, rocks, sands, shoals and coasts, collisions and sinking at sea, fires, jettisons, loss by pirates, rovers or assailing thieves, barratry of the master and marines, and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said vessel, or any part thereof, occasioned by sea perils." *Held*, 1. That the forcible taking possession of the vessel by the officers of the United States government, with the intent to appropriate it to the use of the government for a specific purpose, viz., the carrying of a cargo to Santiago, amounted to a capture; and that the warranty in the policy did not extend to such capture. 2. That the grammatical structure of the sentence containing the warranty precluded any such extension, and no reason was apparent why the construction of the clause should not be according to that structure. *Murray v. Receivers of the Harmony Fire and Marine Insurance Company*, 9

2. And the vessel having been lost while thus in the service of the government, by stranding, and the insured having, without any previous abandonment, made a claim on the United States government for payment for the vessel, by reason of her loss while in the possession of the government officers, which claim was allowed and paid, to an amount nearly equal to the whole value of the vessel; *Held* that these circumstances caused the capture to cease from operating as a total loss; and that the insurers being liable, under the policy, only in case of a total loss, it was immaterial whether they had insured against capture, or not. *ib*
3. *Held, also*, that if the assured had desired to make the constructive total loss arising from the capture, an actual total loss, so far as the insurance was concerned, they should have abandoned; in which case the insurers would have been entitled to the sum paid by the government; but that they, not having done so, but choosing to hold on to their property in the vessel, and to accept the sum paid by the government,

could not claim to recover of the insurers as for a total loss. *ib*

4. If the assured, before abandonment, either recovers the subject insured, or receives an indemnity for its loss, he cannot thereafter elect to abandon. *ib*

J

JUDGMENT.

See APPEAL, 2, 4.

JUSTICE OF THE PEACE, 1, 2.

JURISDICTION

See DIVORCE, 1.

JURY.

See STOCK, 5, 6.

JUSTICE OF THE PEACE.

1. Where a justice of the peace, acting as a court of special sessions, and having jurisdiction of the person of the defendant, and of the offense with which he is charged, imposes upon him, by way of punishment, a larger fine than he has a right to inflict, the defendant may have the erroneous judgment and sentence against him reversed and vacated, upon certiorari from the court of sessions of the county, if he sees fit to pursue that remedy. But, after such fine has been paid, no action will lie against the justice to recover back the amount. *Clark v. Holdridge*, 61
2. Such a judgment is clearly erroneous, and voidable, but not void absolutely. *ib*
3. Where a justice acts without jurisdiction he is a trespasser; but, having jurisdiction, an error in judgment will not subject him to an action; as where, having authority to inflict a fine, he errs in the exercise of it, in measure or degree, only. In every such case, the principle of judicial irresponsibility protects the magistrate. *ib*

4. After a fine imposed by a justice, acting as a court of sessions, has been paid by the defendant, to the justice, to avoid imprisonment, and by the latter paid over to the county treasurer, the justice will be deemed to have received it in his judicial capacity, to and for the use of the county; and, until the judgment is avoided by reversal, no action will lie against him to recover it back, although such fine was for a larger amount than the law allowed. *ib*

L

LANDLORD AND TENANT.

1. It is well settled in this State that a tenant cannot dispute the title of his landlord, unless some change has taken place in the landlord's title subsequent to the taking of the lease. *Bigler v. Furman*, 545
2. The only case in which a tenant who has not entered on the premises may set up want of title in his landlord, is where he was induced to accept possession, or to enter into the lease, by fraud or mistake. *ib*

LEASE.

1. The only ground upon which it can be held that a party obtaining a conveyance or lease of land may be compelled to hold the same as trustee for another, is where such party stood in a confidential relation to the other and has used such relation to his own advantage. *Stiner v. Stiner*, 648
2. Where no fraud is shown, in fact, and no relation exists between the parties in which either owes a duty to the other, and no breach of trust or confidence is shown, whatever advantage one may gain over the other by a sharp bargain, or an overbidding against him, cannot be interfered with. *ib*
8. If a fraud is practiced upon a landlord, by one desirous of obtaining a lease of premises from him, the lessor may in equity set aside the contract; but no such right accrues

to another person from the fact that he also was desirous of obtaining a lease of the same premises, and had applied for one, but had made no agreement therefor, and that the other obtained the same by taking advantage of the lessor's mistaking the lessee for him. *ib*

4. Under such circumstances, the party obtaining the lease owes the other no duty, and the latter has acquired no right to a lease; and between them there is no relation of confidence which can create the obligations that arise from a trust. Hence there is no principle of equity which will allow the court to adjudge the lessee to stand in the relation of trustee to him; even though in negotiating for such lease, the lessee concealed the fact that he did not represent the other party, with whom the lessor supposed himself to be dealing. *CARDOSO, J.*, dissented. *ib*
5. Where, in an action against a lessee, for fraud in obtaining a lease, which the plaintiffs were anxious to procure for themselves, the finding of the court, upon conflicting evidence, was that the defendant did not intentionally or fraudulently divert the lease from the plaintiffs; nor did he know, prior to its execution, that the lessor meant it to be a lease to the plaintiffs; nor did he in any way fraudulently suppress the truth, in the premises; *Held* that this finding was conclusive upon the question of fraud. *ib*

LETTERS.

See EVIDENCE, 2.

LIEN.

1. A judgment creditor, who advances his money upon the faith of an unincumbered title upon the record, without notice, is entitled to the lien acquired thereby, in preference to the secret, unrecorded lien of the vendor, for a part of the purchase money. *Hulet v. Whipple*, 224
2. Such a judgment creditor is to be regarded as a *quasi* purchaser for a

valuable consideration, without notice. *ib*

3. The plaintiff, being the owner in fee of land, conveyed the same to C. by warranty deed, taking the promissory notes of the latter for a portion of the purchase money, payable at different times. At the time of taking such conveyance and executing the notes, C. promised the plaintiff, orally, that he would give him security therefor by bond and mortgage, or would give him security on the land. But no further or other security than the said notes was ever given. Subsequently, the defendants, without notice of any lien of the plaintiff for the purchase money, advanced their money to C. upon the faith and credit of the land and the apparent unincumbered record title thereto in him. The deed to C. was drawn by the plaintiff himself, who did not prepare any mortgage to be given, nor require or demand a mortgage as security. The plaintiff waited two years and nine months without making this equitable claim known to others, or making any demand for its enforcement; he received the amount due upon one of the notes, at maturity; and did not then demand a mortgage, nor did he ever make a demand for it, until he brought this action. *Held* that the conduct of the plaintiff amounted to a legal waiver of his right to an equitable lien upon the premises, for the purchase money, as against the lien of the defendants under their judgment. *ib*

M

MALICIOUS PROSECUTION.

1. If the plaintiff, in an action for malicious prosecution, fails in the proof of either of the following particulars, viz., that the suits instituted against him by the defendant were instituted without probable cause and from malicious motives, and with malicious intent—he is not entitled to a verdict. *Shafer v. Loucks*, 426
2. In such an action it is not erroneous for the judge, in his charge, to present the two theories of the case held

by the plaintiff and defendant, to the jury, and to leave it to them to say whether an offensive charge contained in the complaint in a former action brought by the defendant, was inserted in the honest belief that it was necessary to sustain the action, or merely as a cover to a malicious purpose of destroying the plaintiff's character; where it appears that the offensive charge was not the cause of action, but an incidental act, stated by way of aggravation, to increase the amount of the recovery. *ib*

3. Nor is it error for the judge to refuse to charge that "if the jury, from the evidence before them, believed that the defendant believed he had a cause of action against the present plaintiff, no matter how small the recovery might have been, it was a legal right to bring the action therefor, and it was no matter how much malice might have inspired the defendant; the plaintiff could not recover." *ib*
4. Good faith, merely, is not sufficient to protect the defendant from liability, in an action for malicious prosecution. There must be *reasonable* ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a *cautious man* in the belief that the plaintiff was guilty, to make out such a probable cause as will be a defense. *ib*
5. Belief, and reasonable grounds for belief, are both essential elements in the justification of probable cause. A man is responsible if he fails to call in to his aid reason, caution and fairness. He must not act upon mere conjecture, or impulse or passion. *ib*

MANDAMUS.

1. The relator, on the 30th of July, 1863, enlisted into the military service of the United States as a volunteer, and was credited to the town of L., under the call made by the President of the United States on the 14th day of April, 1864. On the 18th day of August, 1864, the electors of the town of L. at a special town meeting, by resolution, authorized the supervisor, town clerk

and one of the justices to issue certificates of indebtedness to the amount of \$300, as bounty, to each and every volunteer who had been or might be thereafter credited to said town; provided he should have enlisted or re-enlisted between the 13th day of July, 1863, and the 1st day of January, 1864, and had received no bounty from said town; upon the production of the proper evidence that the volunteer had been credited to said town of L. *Held* that when a volunteer bringing himself within the provisions of the resolution of the special town meeting, presented proper evidence of the facts to the town officers, it was their duty to issue to him a certificate of indebtedness for \$300; and that upon their refusal to do so, a *mandamus* was the proper remedy. *PARKER, J.*, dissented. *The People ex rel. Vanderlinden v. Martin*, 286

2. *Held, also*, that the objections to the issuing of such a process—that the relator was a non-resident of the United States, and owed no allegiance to them; that he first enlisted to the credit of another town, and was transferred to the town of L. without his own knowledge or consent—were all technical, and without force. *ib*

3. *Held, further*, that if the town officers had not met, no other demand of performance could be made than a several demand; and if it was necessary for the officers to meet, to perform their duty, then a demand that they issue a certificate was, of itself, a demand that they should meet for that purpose. *ib*

4. By an act of the legislature, land was set apart "as a parade ground for the county of Kings," and declared to be a "public place." Provision was made for acquiring the title thereto by the Commissioners of Prospect Park in the city of Brooklyn, and for assessing the damages of the owners; and it was declared that the lands, when taken, should be the property of said county, "as and for a parade ground," but should be under the exclusive charge and management of such commissioners "for the purposes of police and improvement as such parade ground." *Held*, 1. That it was

the intention of the statute that the grounds should be acquired, not merely for a public place and parade for the use of Kings county, but for the general purpose of military parades. 2. That the provision of the statute placing the land under the exclusive charge and management of the commissioners of Prospect Park, "for the purposes of police and improvement as such parade ground," so far restricted the general sense and meaning of the terms "public place" and "parade ground," as to render the public use of the ground as a parade ground subject to the police regulations which might be properly adopted by the commissioners. 3. That within the lawful exercise of that authority, the commissioners might exclude from the ground such military organizations as in their judgment could not be safely intrusted with its use and enjoyment. 4. That under the authority to establish rules and regulations for police and improvement, the commissioners were invested with a sound discretion as to the military organizations which could be safely and judiciously intrusted with the use of the grounds; leaving them at liberty, in the discreet exercise of their powers, to admit such as would properly use, without abusing, the grounds, and to exclude from them such as they might believe could not be safely or prudently admitted to the enjoyment and use of them, without endangering their condition, or disturbing the good order and security of the neighboring inhabitants. 5. That if this discretion should be improperly made use of, or be perversely abused, the remedy for its correction was not by means of the writ of *mandamus*, but by direct measures for the removal of the commissioners, or for punishing them, in case they should intentionally and willfully omit to discharge the duties imposed upon them by law. *The People ex rel. The Board of Supervisors of Kings County v. The Commissioners of Prospect Park*, 688

MARRIED WOMEN.

1. A married woman is liable for the fraud of her husband acting for her, as her agent, in the purchase of real

estate, although she was wholly ignorant of the fraud practised, and did not authorize it; where she had the fruits of the bargain, kept the property bargained for, and sold it, and retains the proceeds. *Graves v. Spier*, 849

2. She will be held, under such circumstances, to have made the instrumentalities, by which the property was procured, her own. And the law will impute the wrong to her, as it was done for her benefit and she retains the advantage. *ib*

3. Where a married woman, since the acts of the legislature, of 1860 and 1862, concerning the rights and obligations of married women were enacted, being possessed of real estate as her separate property, bargains and sells the same, and joins with her husband in a deed thereof, which contains covenants of seisin, of warranty, and against incumbrances, such covenants are binding and obligatory upon her, so far as to render her separate property liable for their non-performance. *Sigel v. Johns*, 620

4. And an action will lie against her, to recover damages for a breach of the covenant against incumbrances, in the same manner as if she were sole; the object of such action being to satisfy the plaintiff's demand, out of her separate estate. *ib*

5. The statute, neither by its language, nor its fair import, requires the complaint, in such an action, to show that the defendant, has separate property. *ib*

6. The effect of the act of 1860 is that, in the actions provided for, the defendant may, though married, be sued and prosecuted precisely as if she were a single woman. *ib*

7. But this construction does not extend the section prescribing the obligation by means of the covenant beyond its ordinary and natural import; for it can in no possible event render the liability greater than that declared by the statute; as nothing more than the defendant's separate property can be taken for the purpose of satisfying the judgment. *ib*

See HUSBAND AND WIFE.

MILITARY BOUNTIES.

See MANDAMUS, 1, 2, 3.

MILLS.

See WATER, 7, 8, 17.

MONEY PAID AND ADVANCED.

Money was paid by the plaintiffs' assignors to S., in order that such assignors might become members of an association of which S. was president; but there was no evidence, or finding, that they ever did become such members. Subsequently the association was dissolved. Held that the money having been paid for an object that was never accomplished, and which it had become impossible to accomplish, S., or his administrator, was bound to refund the same. *Churchill v. Stone*, 233

N

NEGLIGENCE.

1. In an action to recover damages for personal injuries arising from negligence, the evidence touching the negligence of the parties is for the jury. *Maloy v. The New York Central Railroad Company*, 182
2. Whether it was negligence in the plaintiff to walk upon a sidewalk in a dark night, without a light, is a question of fact for the jury, and not a question of law for the court. *ib*
3. So, also, as to the treatment of the part injured; it being the duty of the person injured to take proper care thereof, and, if necessary, to employ a competent surgeon, evidence touching the injury, and its treatment, is properly submitted to the jury; and the question of the negligence of the plaintiff in regard to the injury is for the jury. *ib*
4. The owners of a vessel are not bound to close the hatches, at night, so as to protect from injury a trespasser, or one who has no right or license

- to be upon the vessel. *Baker v. Byrne*, 488
5. The principle on which owners of property are liable for acts of negligence in the use thereof, is that they are in duty bound to keep their property in such a condition that persons who are lawfully on the premises shall not be injured; but it does not extend to those who are on the premises of others without right, or without permission. *ib*
 6. A pier, like any other public place, must be kept in repair; and if it is not, and damage ensues, the party whose duty it is to keep it in repair is liable for his negligence. But if persons using such pier know that it is unsafe for use, and with that knowledge use it, and sustain loss, the doctrine that one who contributes to an injury cannot recover damages for such injury, applies. *Clancy v. Byrne*, 449
 7. Where it appears, in such a case, from the plaintiff's own testimony, that he was aware that the pier was out of repair, and in a dangerous condition, and yet he directed his horse to be driven on to it, the question whether the plaintiff's own negligence contributed to an injury sustained by the horse should be submitted to the jury, with instructions that if it did, the plaintiff cannot recover. *ib*
- See CARRIERS*, 7, 11, 12, 13, 14, 17, 21.

NEW YORK, (CITY OF.)

1. The provision of the act of 1857, to amend the charter of the city of New York, (*Laws of 1857, ch. 446, § 7*), requiring all resolutions and reports of committees which shall recommend any specific improvement involving the appropriation of public moneys, or the taxing or assessing of the citizens, to be published in all the newspapers employed by the corporation, is to be considered *directory*; and a departure therefrom through mistake, or even negligence, and not intentionally, will not vitiate the proceedings. *Matter of Douglass*, 174
2. But the subsequent clause of the same section, which directs that such resolutions and reports "shall not be passed or adopted until after such notice has been published at least two days," is prohibitory; and the passage of a resolution or report without a compliance with the condition of such clause, is illegal. *ib*
8. The statute does not require two publications. It is sufficient if two days shall elapse between the publication of the notice and the passage of the resolution. *ib*
4. The adoption of the resolution means its passage by both boards; and it is only necessary that two days, after publication of the notice, shall intervene between the introduction of the resolution and its final passage in both boards of the common council. *ib*
5. The act of the legislature, of April, 1870, making further provision for the government of the city of New York, (*Laws of 1870, p. 881*), does not apply to cases which had arisen before the passage of such act; but was prospective only, in requiring the amount erroneously assessed to be deducted. *Matter of Eager et al.*, 557
6. It is erroneous to charge upon the owners of lots assessed for laying a Nicolson pavement, the cost of crosswalks directed by the ordinance, but which have not been actually laid. *ib*
7. A charge of two and one half per cent for collecting an assessment is not erroneous. The statutes give the percentage on the whole amount assessed and collected. *ib*
8. A contract for laying a pavement should not include an allowance to be paid to the contractor for extra compensation in case the work shall be completed before the time fixed by the contract. *ib*

O

ONUS PROBANDI.

- See CARRIERS*, 7.
PARTNERSHIP, 4.
PROMISSORY NOTES, 7.

OPINIONS OF WITNESSES.

1. The opinion of a witness as to the value of services rendered by the plaintiff to the defendant, (1) In procuring the defendant's paper to be discounted, and procuring loans for him in that way; (2) In indorsing the defendant's paper, and thus aiding him with his credit, either by way of sale or loan of credit; (3) For time, travel and expenses in going to different banks and places to get the defendant's paper discounted and renewed, is inadmissible. *Perrins v. Hotchkiss*, 77
2. Opinions of witnesses are not competent to fix a price for the use of credit, where no price was agreed upon; for the reason that credit cannot be said to have any regular and current market value. *ib*
3. If time, travel and expense are expended or incurred by an indorser, for his principal, independently of the brokerage, the indorser may recover therefor, upon the general promise to pay, whatever sum he can prove the services to be worth, not to the defendant in the particular circumstances in which he was placed, but according to the general price and value of such services. *ib*
4. This may be proved by the opinions of witnesses who are qualified to judge of the value of the services. *ib*

P

PARADE GROUND.

See MANDAMUS, 4.

PARTIES.

Where fraudulent assignments made by a judgment debtor are obstacles in the way of a creditor's collecting his demand, all who have participated in creating them are properly made parties to an action to set the assignment aside. *Bennett v. McGwire*, 625

PARTITION.

1. All the parties to an action for partition were the heirs at law of a former owner of the premises, who died intestate, and they took title to the lands in question by descent, as such heirs. The complaint alleged that each of the nine parties, plaintiffs and defendants, was seised in fee simple, and entitled to, one equal undivided ninth part of said premises. The judge before whom the action was tried, without a jury, found as matter of fact, and held as a conclusion of law, that eight, out of the nine parties and heirs, had been advanced by the intestate, in sums differing in amount; to the ninth, no advance whatever had been made; and yet the judge held and decided, as a conclusion of law, and adjudged, that the parts and shares of said premises, "belonging to the plaintiffs and other parties to the action" were "correctly stated and set forth in the complaint;" and that the plaintiffs were "entitled to judgment for partition and division of said lands and premises between them, as demanded in said complaint;" which was, that partition might be made according to the rights and interests of the several parties as before alleged. The judgment or decree followed the conclusion of law, and adjudged and decreed that "each of said plaintiffs and defendants is entitled to the equal undivided one ninth part of said lands and premises." No notice was taken of the advancements, in the decree, or in the conclusions of law, but each party was decreed and adjudged to be entitled the same as though no advancement had been made. *Held* that this was manifest error, and that the exceptions to the findings and conclusions of law, in this respect, were well taken. *Hobart v. Hobart*, 296
2. That it was quite probable, in view of all the facts presented, that some of the parties had no share or interest, whatever, in the lands in question; and that it was certain that the shares of such as did inherit were altogether unequal in proportion, inasmuch as their advancements all differed in amount. *ib*

3. That the party who had not been advanced at all had inherited much the largest share, and possibly the whole, depending upon the value of the premises, as compared with each of the several advancements. *ib*
4. The statute (1 R. S. 754, §§ 23, 24,) provides that the value of all advancements made to children, by an intestate, shall be reckoned as part of the real and personal estate of the intestate; and if any advancement shall be equal or superior to the amount or share which the child so advanced would be entitled to receive of the real and personal estate of the deceased, then such child, and his descendants, shall be excluded from any share of the real and personal estate of the deceased. And in case the advancement is less than such share, then the child so advanced shall be entitled to receive so much, only, of the personal estate, and to inherit so much only of the real estate of the intestate, as shall be sufficient to make all the shares of the children in such real and personal estate, and advancements, to be equal, as near as can be estimated. *ib*
5. Where the rights and interests of the several parties, in a partition suit, have, by the judgment or decree, been adjudged and decreed to be altogether different from those to which they were entitled by law, it *seems* there is no way by which the error can be remedied, except by a reversal of the judgment, and the ordering of a new trial. *ib*
6. It is no answer to an objection that a decree in partition is erroneous in its adjudication as to the rights and interests of the several parties, in the premises, that inasmuch as the lands have been ordered to be sold and the proceeds of the sale, over and above costs and expenses, brought into court, the rights of all the parties may be adjusted properly in the distribution of the proceeds; because the proceeds can only be distributed according to the respective rights of the parties as adjudged and determined by the decree or judgment; and each party will necessarily have the same interest in the proceeds of the sale that he had in the land sold. *ib*
7. Where, in a partition suit, the defendants alleged in their answer that certain conveyances made to parties to the suit, by the former owner of the premises, by way of advancements, were void by reason of undue influence, and incompetency of the grantor; and the court, on the trial, refused to hear the evidence offered in support of such answer, as being irrelevant; *Held* that the error in the ruling, if any, was *waived* and abandoned when the defendants used those conveyances to establish their defense of advancements made to the several grantees, by such conveyances; and that they could not be heard to complain that they were not allowed to contest their validity. *ib*
8. Where a decree in partition required the referee to pay and discharge, out of the proceeds of the sale, all taxes, charges and assessments which might be a lien on the premises; instead of which, as appeared by his report of sale, he sold subject to such liens; *Held* that the order confirming the report was erroneous, and the same was reversed, and the sale set aside and vacated, as being contrary to the decree. *ib*

PARTNERSHIP.

1. On the formation of a partnership between S. & I. under the firm name of "J. S.," a note was made by S. in his own name, which he procured to be discounted by the plaintiff, for the purpose of enabling him to pay in his share of the capital. S. did not represent to the plaintiff that it was a firm note; and the payees, as officers of the plaintiff's bank, knew, or had good reason to believe, that the note was not the note of the firm, but was the individual note of S. *Held* that I. was not liable as a party to the note, in any form; and no recovery could be had against him by the plaintiff, as holder thereof. *The National Bank of Chemung v. Ingraham*, 290
2. *Held, also*, that even if the note had been discounted after the partnership had commenced business, the legal presumption would be that it was the note of the individual who

signed it, and not the note of the firm. *ib*

8. That to entitle the holder to recover, in such a case, against the partners, it must go further, and prove either that the money for which the note was given was borrowed on the credit of the partnership; or that it was used, when obtained, in the business of the partnership. *ib*

4. That the burthen of proof was upon the plaintiff, to show that the note was discounted upon the credit of the partnership. *ib*

5. That if the lender did not know of the partnership; or if the money was loaned on the individual credit of the maker of the note; the fact that the money was applied to the business of the firm did not create a liability on the part of the firm, or constitute the lender a creditor of the firm. *ib*

See PROMISSORY NOTES, 4, 5.

PIER.

See NEGLIGENCE, 6, 7.

PRACTICE.

1. Where exceptions are taken, upon the trial, or after its close, to findings and refusals to find, by the referee, but upon the brief and argument on appeal, no point is taken upon such rulings, the court may assume that they are waived, or not relied upon by the appellant. *Churchill v. Stone*, 233

2. The examination of witnesses upon commission being under the authority of a statute, must be in strict obedience to the statute rule. It is a departure from the common law practice, and is susceptible of great abuse, unless a rigid rule is observed, in practice. *Per POTTER, J. Terry v. McNiel*, 241

8. The testimony of a witness taken upon a commission will be stricken out on the trial if it is evasive, irresponsible or untruthful, or the witness

has not fully and fairly answered the cross-interrogatories. *ib*

4. Where, in the course of a trial at the circuit, the defendant objects to evidence offered by the plaintiff, and excepts to the ruling of the justice, admitting it, it is erroneous to order a verdict in favor of the plaintiff, subject to the opinion of the court, as the defendant is thereby deprived of the opportunity of having his exceptions considered. *Briggs v. Merrill*, 889

5. Such a ruling, under such circumstances, is a mistrial; and a new trial should be ordered, on account of the error, unless the exceptions are waived by the defendant. *ib*

6. If the plaintiff moves for judgment on the verdict, submitting his case and points without argument, and the defendant opposes the motion wholly upon the merits, by submitting, without argument, his points, in which no reference whatever is made to the exceptions taken upon the trial, the latter will be deemed to have waived his exceptions taken at the trial, and consented that the court might decide the motion upon the merits, irrespective of his exceptions. *ib*

7. Upon a motion to dismiss the complaint, at the trial, the grounds should be stated, so that the supposed defect may be obviated by proof, at the time. *Devos v. Brandt*, 498

8. In March, 1870, an action having been noticed for trial by both parties, judgment by default was granted, in favor of the defendant. In April thereafter, that default was opened, upon terms which included setting the case down for trial for the fourth Monday of that month, at special term. *Held* that the terms upon which the default was opened were discretionary; and that no point could be raised, upon them, against the regularity of the trial in April, unless the cause was in such a condition, as to issue, as not to be triable. *The Oneida National Bank of Utica v. Stokes*, 508

9. *Held, also*, that, if the cause was at issue, then, whether it had been

noticed or not, would be wholly unimportant if the judge saw fit to include going to trial as one of the conditions of opening the default. *ib*

10. Whether a cause can properly be brought to trial as against one defendant, when not at issue as to the others, where no previous order for a separate trial has been allowed by the court? *Quara*. *ib*

11. A party, by noticing a cause for trial, must be considered as admitting that it was at issue at that time, and is estopped, by that act, from objecting that issue was not joined. *ib*

12. Until issue joined, a plaintiff has no right to notice the action for trial; and after having brought the defendants to court upon his (the plaintiff's) notice, the latter cannot be heard to say that they had been improperly brought there, if the defendants do not see fit to make the objection. *ib*

See APPEAL. REFEREE.

PRINCIPAL AND AGENT.

1. An agent, having received money for the use of his principal, is bound to pay it over to him, and has no right to return it to the person from whom he received it. *Hancock v. Gomez*, 490
2. He cannot dispute the title of his principal, by setting up an adverse title in a stranger. *ib*
3. Where agents abroad are vested with a discretion, both as to quality and price, in making purchases of teas and silks, for their principals in this country, they are not liable for a failure to purchase, without more proof than the mere fact that some purchases were made, during the time, by other dealers, within the limit. *Heinemann v. Heard*, 524
4. Under such instructions, it should appear that the agents not only could have purchased, but that knowledge of the opportunities of making the purchases was brought home to them, and that their omission to purchase was willful, and not the result

of an ordinary degree of discretion and prudence on their part. *ib*

5. One not authorized to make a sale of property, by its owner, but simply to advertise it for sale and procure some person to negotiate with the owner, cannot make a representation or warranty respecting it which will be binding upon the owner, without his authority or knowledge. *Lanning v. Cole*, 611

6. Such an agent is not clothed with any real or apparent authority to make any representations on the subject. *ib*

7. The defendant, having an interest in a manufacturing copartnership which he wished to sell, requested R. to procure a purchaser for the same, agreeing, in case he did so, to give him a certain portion of the purchase money, if a purchaser at a certain price was found. There was no evidence of any representations made by the defendant to R. or of any express authority to R. to make any representations or statements respecting the property; and no proof of any knowledge on the part of the defendant that any representations or statements had been made by R.; nor was there any authority given to R. to make a sale of the property. *Held* that representations made by R. to the plaintiffs, prior to a negotiation between the latter and the defendant, for the purchase and sale of the property, were not admissible in evidence against the defendant. *ib*

8. *Held, also*, that the case was within the principle laid down in *Smith v. Tracy*, (36 N. Y. 79.) *ib*

9. *Held, further*, that proof of such representations could not be deemed immaterial, inasmuch as the defendant himself was proved to have made the same representations, at the time of the sale; because the court could not see that the jury might not have based their verdict, to some extent, on the representations claimed to have been made by R. *ib*

PRINCIPAL AND SURETY.

See AGREEMENT, 2.

PROMISSORY NOTES.

1. In an action upon a promissory note alleged by the defendants to have been given as the consideration for compounding a crime, it is not necessary, in order to render the note invalid, for them to prove that the maker, in terms, agreed to compound a crime. If it be apparent that such was the intention of the parties, and the agreement was such as to carry out the intent, that is enough. *Conderman v. Trenchard*, 165
2. It is not necessary, in order to render such a contract invalid, that the person receiving the consideration should agree not to commence new proceedings against the person accused. It is enough that he obligates himself to release the defendant from a pending prosecution. *ib*
3. H. having been arrested upon a criminal warrant, on a charge punishable by imprisonment in a state prison, and being in actual confinement, awaiting examination, an arrangement was made between S., the person on whose complaint the arrest was made, and the defendants, by which the latter agreed to give their note to S. for the amount of his claim, constable's fees, and certain items owing by H. to other parties; and S. agreed that upon their so doing H. should be "released, so that he could go to work and earn enough to pay up the note." The note was given, accordingly, and thereupon H. was discharged, and no further proceedings were had, on the criminal complaint. *Held* that the proof showing that there was an agreement to terminate the criminal prosecution then pending, for a pecuniary consideration, and its termination in pursuance thereof, the whole proceedings were illegal and corrupt, and the promissory note given in performance of such agreement was void. *ib*
4. An agreement between partners, for a dissolution of the firm, and for a transfer from one partner to the other of the assets of the firm, is a good consideration for a promissory note, given by the latter for the purchase money. *Springer v. Dwyer*, 189
5. The fact that the purchaser of the assets was induced to enter into the agreement by the false and fraudulent representations of the other partner, respecting the partnership assets, is no defense to an action upon the note by a *bona fide* holder, so long as the agreement stands, and the defendant retains the property transferred, without offering to reassign the same, or demanding a return of the note. *ib*
6. Under such circumstances, however, the maker of the note may maintain an action against the payee, for the fraud; or, in an action upon the note, may set up the fraud as a counter-claim. *Per INGRAHAM*, P. J. *ib*
7. Where the indorsee of a note produces it on the trial, it is to be presumed that he is the holder in good faith, and that he received it before maturity. If the defendant alleges the contrary, the burden of the proof is upon him. A mere denial of ownership, by the plaintiff, a few days after the note matures, will not conclude him, or rebut the presumption of ownership before maturity. *Per BARNARD*, J. *ib*
8. In an action upon a promissory note, between the original parties to it, the consideration may be inquired into, on the trial; and it is subject to the equities existing between the parties. *Divine v. Divine*, 284
9. A promissory note, given for a part of the consideration money of premises described in an executory agreement for the sale thereof, dated the same day, payable on the day of the delivery of the deed, and being a part of the same transaction, may be read and interpreted with the agreement, as a part of it, or as a waiver of its terms, to that extent. *ib*
10. Such a note is a substitute for the payment of the sum agreed to be paid at the time fixed for the execution of the deed, and until paid, that part of the agreement is not performed. It is a collateral and simple promise to pay the same money mentioned in the written agreement. Its only real effect is to postpone the payment of the unpaid part of the purchase money until the day the deed is to be executed. *ib*

11. And the purchaser having omitted to pay the sum specified in the agreement, at the time it became due, and an action therefor being brought by the vendor; *Held* that the plaintiff was bound to prove, on the trial, that before suit brought he had offered to comply with the agreement on his part; that is, that he had offered to convey the premises to the defendant on receiving the balance of the purchase price. *ib*
 12. *Held, also*, that the payment of the purchase money, and the execution of the deed being dependent acts, and the plaintiff not having shown an offer to convey, he had failed to make out a cause of action, and should have been nonsuited. *ib*
 13. In such an action, parol evidence tending to show that the plaintiff not only abandoned the agreement on his part, but that there was a failure of the consideration of the note sued upon, in that the plaintiff had sold the land to another person, and that he had done acts that estopped him from prosecuting the defendant upon the note given for the unpaid purchase money is competent for that purpose; and is not open to the objection that it is intended to change or vary the terms of a sealed agreement. *ib*
 14. Neither the payee, nor any holder, of a promissory note given in part performance of a fraudulent bargain, who is not an innocent, *bona fide* holder for value, before it becomes due, can enforce its collection, against the maker. If a note be given for the price of property purchased in fraud of the payee's creditors, the law will not aid in carrying out any portion of the fraudulent bargain upon which it was given, but will leave all the parties who are chargeable with notice, to rely upon the option of the maker for the performance of the apparent obligation. *Briggs v. Merrill*, 389
 15. A receiver does not stand in the situation of an innocent, *bona fide* holder for value. He acquires title by legal process, and not in the regular course of dealing in commercial paper. *ib*
 16. A note, being of no legal value, as against the maker, in the hands of a receiver, or a judgment creditor of the payees, the taking of it by such creditor, upon supplementary proceedings against the payees, for the purpose of having it applied to the satisfaction of his judgment, cannot operate in law as a ratification or sanction of the bargain upon which the note was given; or estop such creditor from insisting that the bargain was void as to him, by reason of the fraud in which it was conceived and carried out, and that the maker acquired no title to the property for the purchase money of which it was given, as against the claims of such creditor. *ib*
 17. A judgment creditor may take a promissory note given by a third person to his debtor, by virtue of his execution or proceedings supplementary, without thereby relinquishing his right to take property of the debtor, for the purchase money of which the note was given. *ib*
- See AGREEMENT, 1, 2.
PARTNERSHIP.
- R
- RECEIVER.
- See DEBTOR AND CREDITOR, 2, 3.
PROMISSORY NOTES, 15, 16.
- REFEREE.
1. Where the evidence, on a trial before a referee, was greatly conflicting, and its weight depended almost entirely upon extrinsic circumstances, and the degree of credit to which witnesses were entitled, of which the referee, who saw their deportment on the stand, and who lived in the vicinage, was better qualified to judge than any reviewing court could be, who saw the witnesses only upon paper; *Held* that upon well established authority the case could not be reviewed, on appeal, upon the facts. *Terry v. McNiel*, 241
 2. Whenever, in the facts found by a referee, it is seen that there has been

a conflict in the testimony of the witnesses, it is well established that the finding of the referee, who has seen the witnesses, observed their manner and dispositions in testifying, and had better opportunities than the court for learning their character for veracity, must be sustained. *Baker v. Spencer*, 248

8. If portions of the evidence, standing alone, tend to sustain the findings of the referee, that is sufficient. It is not the duty of the reviewing court to go further. *ib*

4. If, from the evidence on paper, it even appears that the weight of evidence is against the referee's finding, the appellate court will not interfere so far as to reverse; unless such weight is so striking and palpable as to excite surprise. *ib*

See APPEAL, 6.

S

SET-OFF.

1. The statute of set-off proceeds upon the equitable principle of not allowing one party to recover, from another, money due, while at the same time he withholds from such other that which is legally and equitably due from himself. *Gutchess v. Daniels*, 401

2. In every case where there is a good cause of action, and also a valid claim which is the subject of set-off, in the hands of the defendant, there is a mutual violation of the obligation to pay. *ib*

3. An agreement by commission merchants to sell grain to be shipped to them by another firm; to apply one half of the net proceeds of the sales upon a prior indebtedness of the consignors; and that the other half shall be paid over to the latter, and not otherwise applied, is not binding upon the consignees, so as to deprive them of their legal right to set off the prior indebtedness, against the demand of the consignors in the hands of an assignee. *ib*

SEWERS.

See STATUTES, 2.

SHIPS AND VESSELS.

See NEGLIGENCE, 4.

SPECIFIC PERFORMANCE.

1. It is well settled, in this State, that a court of equity will not disregard time, and decree a specific performance of a contract for the sale of real estate, at the suit of a party in default; unless he not only applies promptly, but has a reasonable excuse for not performing on the contract day. *Hubbell v. Von Schoening*, 498

2. The defendants, who had agreed to sell a lot of land to the plaintiff, were at the place agreed on, on the day appointed, for the purpose of passing the title, and waited the whole business day, ready to complete the sale, but the plaintiff was not ready, on his part, and did not appear. There was no pretext of any fraud or deceit having been practised upon him by the defendants, and the only excuse that he offered having been found not to be true, upon conflicting evidence; it was held that a judgment of dismissal, entered in an action brought by the purchaser for a specific performance, could not be disturbed. *ib*

STAMPS.

Assignments introduced in evidence are not void because the stamps thereon are not canceled; where there is no evidence, or room for pretense, that they were left uncanceled for the purpose of defrauding the government. *Graves v. Spier*, 849

STATUTES.

1. A statute affecting rights and liabilities should not be so construed as to act upon those already existing. And it is the result of the decisions, that although the words of a statute are so general and broad, in their literal extent, as to

comprehend existing cases, they must yet be so construed as to be applicable only to such as may thereafter arise; unless the intention to embrace all is clearly expressed. *Matter of the Protestant Episcopal Public School*, 161

2. The construction of a sewer having been directed, by a resolution of the common council of the city of New York, proposals for the work were opened on the 6th day of April, 1865, the contract awarded to the lowest bidder, and the terms thereof agreed upon, and on the 13th of April a contract was executed between the corporation and such bidder. Intermediate the award and the execution of such contract, viz., on the 12th of April, 1865, the legislature passed an act declaring that no sewer should thereafter be constructed, in said city, except in accordance with a general plan of sewerage to be devised by the Croton Aqueduct Board. *Held* that the proceedings under the resolution having been regular, and in conformity to the requirements of the city charter, they vested in the person whose bid was accepted a right of which he could not be divested without compensation, and created a liability on the part of the city to him. And that, so far as related to such vested rights of the bidder, the statute must be construed as prospective, and not retrospective. *ib*

See MANDAMUS, 4.

MARRIED WOMEN, 5, 6, 7.

NEW YORK, (CITY OF,) 1, 2, 3, 5.

STOCK.

1. A complaint alleged a sale of stock, by the plaintiffs to the defendants, at a specified price, deliverable at the option of the buyers, within four days. It averred that the buyers did not exercise that option, and that a tender of the stock was made to the defendants, on the fourth day, and payment demanded and refused. It also averred that the price of stock, on the day when it was tendered, was \$87 per share, being \$21 per share less than the contract price; and that the defendants had not paid for the stock. *Held*, on demurrer, that the plaintiffs had their election either to tender the stock and demand payment, and then sue for the purchase money, treating the property as belonging to the purchasers, or to keep the property, and sue for damages for breach of the contract. *Merriam v. Kellogg*, 445
2. Where the article agreed to be sold is stock, it is not necessary to sell it, in order to ascertain its value; and if the value of the stock can be ascertained daily, without a sale, a sale becomes unnecessary. *ib*
3. To enable vendors of stock deliverable at the buyer's option within a specified time, to recover the value, of the buyer, on a failure to perform, an averment of tender and demand of payment is sufficient. They need not aver that they kept the stock, and were ready to deliver it. *ib*
4. In an action against a broker, to recover damages for the conversion of shares of stock alleged to have been deposited with him as security against loss on purchases and sales of gold, for account of the plaintiff, the latter testified that the pledge of stock was made merely to secure a margin. The defendant swore that he required a margin of ten per cent, which he expected to receive in money, but that after the purchase of the first \$100,000, the plaintiff inquired if he could not use the stock, instead of the money, and the defendant consented to take it. *Held* that by the proposition to give the defendant the stock instead of the money, and for its use by the defendant, it was clear that the intent was that the defendant should use the stock as he might lawfully have used the money; and that for doing so, he was not liable, in an action of tort. *Lawrence v. Maxwell*, 511
5. *Held*, also, that as the statements of the parties were contradictory, it came within the province of the jury to decide which was the contract between them; and the judge could not take that question from the jury. *ib*
6. *Held*, further, that an offer to show that, before this transaction, shares had been deposited with the defendant, and he had hypothecated the

same, and that such use of the stock being communicated to the plaintiff he made no objection thereto, should have been admitted, as showing the construction of the contract by both parties. And that it was properly for the consideration of the jury, in determining what the terms of the contract were. *CARDOSO, J.*, dissented. *ib*

7. That although by the contract as stated by the defendant he had a right to use the stock in the same manner as the cash, had that been deposited, he was bound by his contract to return the stock whenever the plaintiff tendered the amount due to him, for which it had been pledged. *ib*

8. That upon a tender being made, it was the duty of the defendant, at once, or within a reasonable time, to restore the stock; and that having failed to do so, the plaintiff was entitled to recover, on the contract, its value. But that if the defendant, by the contract, had the right to use the stock, by hypothecation, there was no tort committed by the omission to restore it, and the plaintiff's remedy was on the contract, and not for the conversion. *ib*

STREAM.

See WATER.

SUPERVISORS.

See BOARD OF SUPERVISORS.

T

TENDER.

See STOCK, 1, 8.

TRUSTS AND TRUSTEES.

1. It is an established rule of equity, that where trust and confidence are reposed by one party in another, and the latter accepts the confidence or trust, equity will convert him into a trustee, whenever it is

necessary to protect the interest of the party so confiding, and do justice between them. *Foots v. Foots*, 258

2. Certain premises were conveyed to the plaintiff's husband, the consideration therefor being mainly paid by the plaintiff. Subsequently, in 1844, for the purpose of protecting the property, and of keeping it for the plaintiff's use, the plaintiff and her husband conveyed the same to S. F. and O. F., without consideration. S. F. then conveyed the same to O. F. without consideration, upon a parol agreement that the grantee should hold the same for the plaintiff's benefit. After the execution of the deed to him, G. F. always recognized, so long as he lived, the fact that the premises belonged to, and were the property of, the plaintiff, and that he held the same simply for her benefit. The plaintiff, with her husband, had for more than 20 years held uninterrupted and undisputed possession of the premises and paid taxes thereon. In 1854, G. F. made a will, by which he devised the premises to the plaintiff. In 1858 he was married to the defendant E. F., and had issue, the defendant C. F., and died in 1864. The plaintiff claimed the premises as belonging to her, in fee, and the defendants claimed that G. F. was the owner thereof, and that upon his death his widow became entitled to an estate in dower therein, and his daughter C. F. to an estate in the remainder, in fee. There were no creditors whose rights were involved. *Held*, 1. That the transaction was simply the naked transfer of the nominal title of the property to G. F. to be held without interest in him, for the benefit of the plaintiff. 2. That the referee having found, as a fact, that G. F. in taking a deed of the property, intended in good faith to hold it in trust, as the protector of the plaintiff's rights, and only for her benefit, the court would not permit those claiming under G. F. to insist that he held it absolutely as the true and lawful owner. 3. That had G. F., at any time during his life, attempted to dispossess the plaintiff of the estate he so held nominally for her benefit, a court of equity would have restrained him, upon application,

and, upon demand, have compelled him to convey the title to her.

4. That the section of the statute relative to fraudulent conveyances, (2 R. S. 184, § 6,) which requires that every trust or power over or concerning lands shall be by deed or memorandum in writing, had no application to the case. 5. That it was no objection to the granting of relief to the plaintiff that there was no written agreement between her and G. F. That equity made the latter a trustee *ex maleficio*. 6. That the defendants could interpose no defense of the statute of uses and trusts, or the statute of frauds, that G. F., through whom they claimed, could not set up. That it would be fraudulent in him to deny the plaintiff's equitable title to the property; and a court of equity would not allow him to set up either of those statutes to be used as instruments of fraud. *ib*

8. Implied and resulting trusts are, from their very nature, excepted from the provisions of the Revised Statutes relative to uses and trusts. *ib*

4. Their existence, generally speaking, can only be established by parol evidence; and it requires the power of a court of equity to compel the performance of such implied agreements, and to protect the rights and interests of the *cæstui quo trust* therein. This power has, in no respect, been abridged or impaired by the Revised Statutes. *ib*

See LEASE.

V

VENDOR AND PURCHASER.

1. Of real estate.

1. Whatever is done between the parties, under a supposed agreement, where there is a mutual misunderstanding as to its terms, is not binding; and though both parties consent, at the time, to the delivery of a portion of the property agreed to be sold, each supposing that such delivery and acceptance is to be a part performance of the contract, and that the purchaser will only be-

come the absolute owner when the whole contract shall have been performed, the law will not imply that either of the parties intended that the property delivered was to be absolutely the purchaser's in case he failed to comply with the whole agreement. *Fullerton v. Dalton*, 236

2. Where one is in possession of property with no other claim of title thereto than a partial or conditional one, as purchaser under a void contract of sale, which each party refuses to perform, except according to his own understanding of its terms, the title of the property is not changed, and the vendor is entitled to recover such property, upon legal demand made. *ib*

8. After demand of such property is made, the purchaser is wrongfully in possession; and his use of the property, afterwards, is a conversion thereof to his own use. *ib*

2. Of chattels.

4. The defendant, representing to the plaintiff that he had the agency for the sale of a sewing machine, for a particular county, and the right to sell and transfer the same, sold and transferred such agency to the plaintiff, who, relying upon the truth of such representation, gave his note for the price, and subsequently paid the same. In an action by the plaintiff to recover back the money so paid, the referee found, upon conflicting evidence, that the defendant had not in fact any agency for said county, or right to sell and transfer the same, and that his representations were false. Held that this finding warranted the conclusion that the plaintiff was entitled to recover back the purchase money paid by him, with interest. *Baker v. Spencer*, 248

5. In the absence of any express contract, fraud or imposition, there can be no responsibility on the part of the vendor, for the quality of what is sold as slops or swill from a distillery. If the purchaser has what he bargained for, viz: slops from a distillery, the doctrine of *caveat emptor* applies. *Holden v. Clancy*, 590

6. If there were a warranty of merchantable quality implied in such a

sale, purchasers cannot recover damages on account of the inferior quality of the slops furnished, where it appears that they received and consumed the slops, from day to day, with a full knowledge of their quality, and without returning, or offering to return them, or giving the vendors notice to take them away, or not to deliver any more. *ib*

7. Such conduct on the part of purchasers, upon well settled principles governing executory contracts of sale, is a complete waiver of any defects in the quality of the article purchased, and brings the case within the principle of *Reed v. Ramadell*, (29 N. Y. 358.) *ib*

Lien of Vendor. See LIEN.

See PROMISSORY NOTES.
SPECIFIC PERFORMANCE.
STOCK.
WARRANTY.

VERDICT.

See DAMAGES.

W

WAIVER.

See LIEN, 3.
PARTITION, 7.
PRACTICE, 6.
VENDOR AND PURCHASER, 1.

WARRANTY.

1. The general covenant, to warrant and defend premises conveyed, against all lawful claims, includes the covenant for quiet enjoyment; and the true meaning of it is that the grantee and his heirs and assigns shall not be deprived of possession by force of a paramount title. It runs with the land, and passes with the fee to any subsequent grantee of the same title. *Rindskopf v. The Farmers' Loan and Trust Company*, 86
2. Such a covenant, it is well settled in this State, is only broken by

actual eviction from the premises. Where there has never been any possession under or through the deed containing the covenant, there can be no actual eviction. *ib*

3. Where, at the date of a deed, the premises granted are in the possession of other persons claiming adversely to the grantee and his grantor; and such persons, and others claiming under them, are permitted by the grantee and those deriving title from or through him, to remain undisturbed until their adverse possession ripens into a good title, as against the grantee, the latter, or one claiming under him, cannot be allowed to recover upon the covenant of warranty, for a failure of title by such means; they not having lost their land by a title paramount, existing at the time of executing the covenant, but by their own laches, in suffering an imperfect and inferior claim of title to become a legal title paramount to theirs. *ib*

See AGREEMENT, 3.
INSURANCE, (MARINE,) 1.
PRINCIPAL AND AGENT, 5.
VENDOR AND PURCHASER, 5.

WATER.

1. The owner of land through which a stream of water naturally flows has the right to use the water, there, in any manner he may see fit, so that he does not interfere with the rights of other owners to the use of the water, on the stream below, or above. *Pollitt v. Long*, 20
2. This right to use the water is incident to the ownership of the land through which the stream naturally flows, and pertains alike to every owner of the soil. *ib*
3. And even if an owner has had the uninterrupted flow and use of a stream on his own land, for twenty years or more, he does not thereby acquire such a prescriptive right to such uninterrupted flow and use that he can prevent an owner of land on the stream above from using and enjoying the water upon his land in any reasonable and proper manner. *ib*

4. Yet an owner above may acquire a right, by prescription, to detain and obstruct the flow of water, to an accustomed extent, and for a fixed period, against the owners below.
Per JOHNSON, J. ib
5. The right to water flowing through land is the right of use, only; and this is a right belonging to each owner, in common with every other owner of the land through which the stream naturally flows. No one owner can divert it from the land of another, or obstruct and detain it to the injury of another, without rendering himself liable in an action to recover damages, or to obtain such other relief, or remedy, as the particular case may call for. ib
6. All that the law requires of the party, by or over whose land a stream passes, is that he shall use the water in a reasonable manner, and so as not to destroy, or render useless, or materially diminish, or affect, the application of the water, by the proprietors below, on the stream. He must not shut the gates of his dams and detain the water unreasonably, or let it off in unusual quantities, to the annoyance of his neighbor. ib
7. Where the defendant, the owner of a mill situated above the factory of the plaintiffs, upon the same stream, had been in the habit of keeping his gates closed through several of the working hours of each day, and for that time depriving the plaintiffs wholly of the use of the water for their factory, and then letting it off in such unusual quantity that the plaintiffs could only use a small portion of it while passing, when, without such detention, they would have been able to run their factory constantly and without interruption; *Held* that this conduct of the defendant was clearly unjustifiable, and gave the plaintiffs a good right of action, at least to recover damages for the injury occasioned by the detention. ib
8. *Held, also*, that this was a proper case for the preventive remedy by perpetual injunction. ib
9. Since the Code, it is unnecessary, as a preliminary to that species of relief, to settle the right by any action at law, even where the right is doubtful. ib
10. The true measure of damages, in such a case, is the value of the use of the water to the plaintiffs, situated as they were, during the time they were wrongfully deprived of it. ib
11. Where, in such an action, the plaintiffs were allowed to prove, how many yards less of cloth they made, in consequence of the detention of the water by the defendant, than they could have made, had the water not been detained as it was, and what the profit on each yard manufactured and sold was, at the price at which they sold what they did make; *Held* that this was clearly incompetent for the purpose of ascertaining the amount of damages sustained by the plaintiffs; it being wholly speculative and conjectural. ib
12. Every person has the right to drain the surface water from his own land, to render it more wholesome, useful or productive, or even to gratify his taste or will; and if another is inconvenienced, or incidentally injured thereby, he cannot complain.
Waffle v. The New York Central Railroad Company, 418
13. No one can divert a natural water course and stream, through his land, to the injury of another, with impunity; nor can he, by means of drains or ditches, throw the surface water from his own land upon the land of another, to the injury of such other. ib
14. But where a person can drain his own land without turning the water upon the land of another, or where it can be done by drains emptying into a natural stream and water course, there can be no doubt of his right thus to drain, even though the effect may be to increase the volume of water unusually, at one season of the year, or to diminish the supply at another. ib
15. No one can be required to suffer his land to be used as a reservoir, or water-table, for the convenience or advantage of others. ib
16. The owner of land through which a stream flows may increase the vol-

ume of water by draining into it, without any liability to damages by a lower owner. He must abide the contingency of increase or diminution of the flow in the channel of the stream, because the upper owner has the right to all the advantages of drainage or irrigation, reasonably used, which the stream may give him. *ib*

17. The plaintiff owned a saw-mill, upon a small stream nearly two miles below the point where the defendant's road crossed such stream. At that point, the land was naturally low and marshy, and the defendant, in constructing its road, raised the bed thereof above the natural surface of the land, by excavations on each side, leaving ditches, by means of which the surface water was drawn off and passed into this stream, on each side of the road-bed, where the stream was crossed by the road. Such ditches were wholly upon the defendant's land, and conducted the surface water into the stream upon its own land. The complaint alleged, and the testimony tended to prove, that by means of these ditches the water from such low land was drawn off and led into the stream so rapidly that in times of flood and high water, it filled the plaintiff's pond so full that he could not use the same, but was compelled to open his gates and let the water flow through; and that in a dry season the supply of water in the stream was, by the same means earlier exhausted, and the plaintiff's mill thereby compelled to lie idle and unemployed, for want of water, for a much longer period than formerly. *Held* that these facts constituted no cause of action; and that the plaintiff was properly nonsuited. *ib*

WILL.

- A testator, by the third clause of his will, gave and bequeathed to his executors the sum of \$20,000 *in trust* to invest the same and keep it invested, and from the income to pay to his brother and sister \$500 each, during their respective lives, and to pay annually the residue of the income to the general synod of the

Reformed Protestant Dutch Church, to be applied to the support and education of pious, indigent young men preparing for the ministry; and upon the decease of either his said sister or brother, to pay annually the whole residue of said income, after paying \$500 annually to the survivor, to the said general synod, to be applied as before mentioned; and, upon the decease of the survivor, to pay said principal sum of \$20,000 to the said general synod, to be applied as before stated. By the fifth clause, the testator gave the residue of his estate to the said general synod "to be applied to the support and education of pious, indigent young men preparing for the gospel ministry in that church."

Held, 1. That so far as the fifth clause of the will was concerned, the law of trusts had no application; there being but one trust created by the will, viz, the one mentioned in the third clause, upon which there was no question, and the only relevancy of which was, so far as it tended to confirm the view that the fifth clause did not, and was not intended to, create any trust. 2. That the third clause showed that the testator was well advised as to the proper language to be employed when the bequest was to be held in trust; and that the fact of his not using similar phraseology in the fifth clause, only went to show that the devise therein mentioned was not intended by him to be construed otherwise than, by its terms, he had expressed it. 3. That the purpose avowed, in the fifth clause was, in the highest and holiest sense, both religious and charitable; and the devise was absolute in its terms; no condition whatever being imposed. 4. That as the fee vested absolutely in the synod, there could be no doubt of the validity of this provision of the will. 5. That the question whether the property, with that which the synod already held, would exceed in amount the sum to which its charter restricted it, could not be tried in an action brought by the executors, for the construction of the will. That that question was not to be determined collaterally, but only in a direct proceeding by the State. 6. That the condition imposed in the act incorporating the synod being, not

against its *taking*, but against taking *and* holding, the corporation could *take*; but whether it could *hold*, was another question, not necessary or proper in this collateral way to be considered—a question purely of public policy, with which individuals had no concern, but in which the State, as the sovereign, was alone interested, and which it might either raise or waive, according to its pleasure. *Rainey v. Laing*, 458

WITNESS.

1. In an action brought against the writer of letters, by the administrators of the person addressed, the defendant is an incompetent witness, under § 899 of the Code, to prove that the letters were written, or that they were received and retained by the person addressed. *Reese v. Mason*, 89
2. His testimony is incompetent, as relating both to a "transaction" and "communication" between the party testifying and a deceased person,

whose claims against such party are the subject of the litigation. 35

3. The provisions of § 899 of the Code relate as well to written as to verbal communications. 35
4. Where the object of questions put to a witness, on cross-examination, is to test his memory, the allowance thereof is a matter within the discretion of the referee. *Terry v. McNiel*, 241
5. Where the defendant had previously been called as a witness in his own behalf, and had testified to an examination of certain account books of the plaintiff's intestate and the entries therein, and had impeached such entries as to an omission of credits to himself; *Held* that it was competent to impair this testimony in all possible legal ways, and to impeach the memory of the witness as to such books, and the entries therein, by their production; and to do this by the testimony of the plaintiff, with whom the defendant had examined them. 35

END OF VOLUME FIFTY-EIGHT.

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